

1 quit with notice. And what happened there is the guy
2 said, "He told me he quit, so therefore, it's quit with
3 notice." And that's how it is coded on the summary
4 sheet.

5 But if you look at the Termination Report
6 it actually has a detail that explains that he was
7 supposed to be to work on the 8th, "and I called him up,
8 and I pushed the wrong button, and I shouldn't have done
9 it." And Mr. Migis, if February 8th is the correct last
10 day of work, was paid on time.

11 It's absolutely critical that Auto Zone
12 produce these records. We are not stonewalling. But
13 this was never ordered in the -- and I know that you are
14 not that happy, and I understand that. But you have
15 to --

16 THE COURT: Have you produced any, yet, of
17 these termination files?

18 MS. COLLINGS-TIFT: No. I can produce some
19 of them apparently tomorrow. I can't give you a precise
20 percentage. I offered to give them to them as time
21 rolled along if they would give us an extension. The
22 answer was no.

23 THE COURT: Well, that's been set out in
24 the papers, and plaintiff denies that they refused to
25 receive documents on a rolling basis. And it makes no

1 sense, frankly, if they are after 200 files, and they
2 can only get some -- some are better than none -- even
3 though it's not proper for withholding them prior to
4 discovery. So --

5 MS. COLLINGS-TIFT: I am not saying they
6 refused. That was never, that was never discussed, that
7 if you get us some, that will be fine for now. It was
8 if you get us some, that's still too bad for you. You
9 haven't complied. That's what was said.

10 THE COURT: Let's hear from the plaintiff's
11 side. Who is going to argue from the plaintiff's side?

12 MR. BAILEY: Thank you, Your Honor. The
13 Court's recollection is accurate. What occurred was
14 that we had a motion to compel where there were a number
15 of Requests for Admissions that had not been responded
16 to timely. And so we had actually asked that those be
17 deemed admitted.

18 The Court gave defendant essentially a
19 second chance, and said I am going to call these denied,
20 but the Request for Production says, "Produce the
21 underlying documents that you -- upon which you base
22 your denial." And that's what the original 15 calendar
23 days to produce those underlying documents was.

24 THE COURT: Do you have an independent
25 Request for Production? I saw one request dated

1 November 19th, '07, one November 30, '07. Are all of
2 your Requests for Production tied to the Requests for
3 Admissions?

4 MR. BAILEY: No. The only thing that is
5 actually due tomorrow are those documents that were
6 subject to your original order. And then subject to
7 your second order, basically, was a motion on our part
8 to enforce the order that they didn't comply with the
9 first time.

10 And if you will recall, we had to deal with
11 this spreadsheet. And what we asked for were just the
12 underlying documents that have allowed for the
13 spreadsheet to be made, including provision for the
14 defendant to provide us in electronic format the Excel
15 spreadsheet that they gave us to begin with. In other
16 words, we wanted the spreadsheet in electronic format.

17 And you ordered that they produce the
18 spreadsheet as well as the underlying documents that
19 would go to -- I think there's 148 people on here, but
20 my recollection is I counted them. But if Ms. Tift
21 thinks there's 200 -- somewhere between 150 and 200
22 people are on the spreadsheet, identified by employee ID
23 number. And it's three pages, plus 1, 2, 3, 4, 5, 6, 7,
24 8 people. So there's three total pages, and then eight
25 additional.

1 We had not asked for -- we asked that we be
2 provided with the underlying documents that allowed for
3 this document to come to play, whatever those documents
4 are. We understand that they utilized the Termination
5 Report and other documents. But they based -- they
6 provided this document to tell us that this document is
7 what they used to deny the Request for Admissions.

8 But on the face of the document it
9 appears -- and Ms. Tift is right -- the document itself
10 that they indicate that they relied on to make the
11 denial seems to indicate that they could not have made a
12 denial of those admissions. Because as we go through
13 them -- and I have a color-coded chart that you provided
14 me -- on the voluntary quit with notice, the ones that
15 are marked -- that they used their schedule with, the
16 very first person that is on the list, which is the
17 second person down, indicates that they left on May 12,
18 2007, and their check was May 16, 2007, four days later.
19 And we said, well, if they gave notice, the check would
20 have been due the last day they worked.

21 If that's accurate, it doesn't make any
22 sense. We need the underlying documents. You ordered
23 them produce it. I don't know that they have to go
24 through every personnel file to do that, but if they do,
25 there's only 100 of them. I suspect they could ask the

1 stores that they worked in to call up the five or ten
2 that each one has and do it.

3 I am amazed that a paperless company can't
4 scroll through their .pdf files and pull whatever
5 documents that they used to make this document. Seeing
6 that -- somebody had to have done that in the first
7 place, I would think. But I am speculating. Maybe this
8 document is absolutely accurate, and there is no
9 underlying documents for it. They indicated there were.
10 So seems to me --

11 THE COURT: What do you want to do in view
12 of the situation? I am in the middle of a trial. It's
13 not anything that judges relish to have these kinds of
14 fights continually come back and dropped on the Court on
15 short notice on an expedited basis.

16 Mr. Bailey, you hear what they say, we
17 can't get -- I am not sure what can be produced by the
18 due date tomorrow, but I guess something will be
19 produced. And we need three weeks for the rest of it.
20 And you heard what she said, what do you want to do?
21 What are you asking for from the Court?

22 MR. BAILEY: Well, Your Honor, we had
23 earlier sought sanctions with respect to this, and that
24 motion has still not been heard. We had it on an
25 expedited basis, and that hasn't been heard, to begin

1 with. But to the extent they had all of this time to
2 get through these it would seem to me that it might be
3 appropriate for the Court to put some monetary daily
4 amount they have to tender for every day they sit on
5 this thing and not get them out to us.

6 It seems to me like the only way we're
7 going to get them moving forward is if something is
8 going to happen, and it's going to cost them some money
9 or something. This is not -- we're not -- frankly, I
10 have never had anybody not produce when the Court has
11 ordered it twice. So I don't know the answer to that.
12 I think it's something that the Court needs to do
13 affirmatively to cause them to do this immediately, and
14 put some emphasis on it -- 15 more days? I mean, I
15 would think that they could put somebody on this and do
16 it quicker than 15 days. They have already had five
17 months.

18 THE COURT: Well, they are asking for
19 21 days.

20 MR. BAILEY: 21 days? It's crazy. I don't
21 know what the answer is.

22 THE COURT: Well, every case, like this,
23 anyway, has two sides, and the judge is in the middle.
24 And judges act in a responsive way, somebody makes a
25 motion and the judge rules. They made a motion for an

1 extension. You are saying deny the motion, and put a
2 per day fine or something. There's a provision in the
3 code that fines be paid to the Court, but who does this
4 get paid to, and what amount is it?

5 MR. BAILEY: Your Honor, I think it would
6 go to the Court. Obviously we have been here three
7 times now over this same issue. There needs to be
8 something that will cause these folks to not play with
9 us about this.

10 I think the Court's perception is accurate.
11 We get caught in these one year binds that we always get
12 caught in, and we're going to do a trial schedule with
13 the Court trying to keep up, and we can't do it if they
14 don't produce. And this is -- this is not that
15 difficult.

16 So I don't have a suggestion. The Court
17 gave them an order. I have never -- been doing this a
18 long time. People tend to obey, at least the second
19 order, and get it done on time. I don't know what it's
20 going to be. And I don't have -- beyond what said, I
21 don't have another suggestion.

22 MS. COLLINGS-TIFT: Your Honor, may I
23 briefly speak to this. I want to point out one thing
24 that Mr. Bailey said that is very troubling to me. He
25 just asked you -- and what will happen is there will be

1 an order that comes out that says this is what you said,
2 although you never said it.

3 Mr. Bailey is asking for this document, the
4 summary chart, to be produced in Excel format, and
5 there's a whole bunch of reasons why that is not
6 appropriate. It's manipulable data. What you need is a
7 hardcopy of this information so that everybody agrees
8 what goes back and forth between us is what went back
9 and forth between us. An electronic copy that they can
10 change or alter or can get erased unintentionally is not
11 appropriate. And it's not a backup document. But
12 that's what happens --

13 THE COURT: Well, I am getting confused,
14 because I thought we were talking about what you call
15 termination files. I thought we were talking about the
16 underlying documents to the spreadsheet?

17 MS. COLLINGS-TIFT: Yes.

18 THE COURT: And, thirdly, I thought we were
19 talking about an order that occurred long ago ordering
20 that that spreadsheet be produced in electronic form.
21 Courts have, with electronic discovery, which I am sure
22 you are very familiar with, courts have been ordering
23 this for a long, long time and this is not unusual. And
24 if somebody tries something underhanded, such as
25 manipulating an electronic document -- anything could be

1 manipulated, including a photograph. If somebody does
2 something fraudulent -- not suggesting that would occur,
3 but you are indicating that could happen -- then there
4 are remedies for that. And you could certainly prove
5 that was going on quite easily.

6 MS. COLLINGS-TIFT: I do not see any
7 indication in this record that this was ordered to be
8 produced in electronic format. They just say it as
9 though that was a discussion. Nobody produces --

10 THE COURT: Why is that a problem producing
11 it?

12 MS. COLLINGS-TIFT: It's not a problem.
13 It's just we don't think this should be produced in any
14 form other than a .tiff or .pdf. And if they want that
15 in electronic form, that's fine, but I don't know why
16 they --

17 THE COURT: Documents are produced in Excel
18 format all the time. Why is that a problem here?

19 MS. COLLINGS-TIFT: Why are they asking for
20 this? Can we produce it in .pdf form? We will. Can we
21 produce it as a .tiff? We will.

22 MR. BAILEY: Your Honor, you will recall
23 you looked at the Powelson declaration that was Exhibit
24 B, page 2 of 3, which had the definitions of what we
25 were asking for. And one of the definitions was

1 specifically the electronic data, and obviously we would
2 like to have this document, which is labeled as 2.xls,
3 it's an Excel spreadsheet, the second version,
4 apparently -- we would like to have that document
5 produced to us in its native form. We want to see it.

6 Sure these can be manipulated. There isn't
7 any question. But for the purposes of discovery,
8 electronic discovery on a CD of this document, I get
9 those -- that's just standard formatting. To argue that
10 they will give us a .pdf file is generally -- piques my
11 interest.

12 And my real interest is that this document
13 has been proffered to this Court as being relied upon to
14 deny the request that we made. My suspicion is -- I
15 don't know that -- but my suspicion is that this
16 document was created after the denials. I would like to
17 see that.

18 MS. COLLINGS-TIFT: Your Honor, even if
19 what he said is true, let's say this summary was
20 produced after the Request for Admissions, it doesn't
21 mean anything because it doesn't mean the data didn't
22 exist. It means that on this date this was created.
23 Somebody pushed a button and made a selection of
24 different kinds of information to put in a chart and
25 printed it out. It doesn't mean the data didn't exist.

1 The data has existed forever.

2 THE COURT: I am prepared to rule on what
3 is before me. Defendant has moved for an extension of
4 time for the production that was ordered long ago,
5 Having reviewed the motion and heard oral arguments, and
6 having reviewed the substantial file that has been
7 coming from this since February of 2008, I do not find
8 the motion well taken. The motion for extension of time
9 is denied.

10 On the specific question of producing the
11 Excel spreadsheet that is apparently in an Excel format,
12 Excel software program, a Microsoft product, that has
13 been discussed with the Court and held up by defense
14 counsel as something that is important. And it appears
15 to me that is proper discovery for the plaintiff to
16 receive that in the Excel format, and that should be
17 done.

18 And I don't see any reason or any question
19 about whether that was actually ordered earlier. I
20 don't see any reason why that would take very long at
21 all. Today is Tuesday, the 22nd. It would appear that
22 there would be no reason that cannot be produced by noon
23 on Friday of this week, which is April 25th. And so
24 that's my order on that.

25 Plaintiff, in its response, in his response

1 to the motion, last line, asks for an award of expenses.
2 I am making an award of attorney's fees on the
3 plaintiff's -- reasonable attorneys fees for plaintiff's
4 work in responding to this motion. And we're not really
5 in a position to take the specifics of this matter up
6 now.

7 Please prepare your petition for an award
8 using the standards of ORCP 68, exchange information
9 with defendants. And if you can't agree, I guess you
10 will need to file your motion for attorney's fees for
11 this proceeding today. And the documents that led to
12 this proceeding, you will have to file.

13 In terms of noncompliance with the prior
14 Court orders, Mr. Bailey has requested an unspecified
15 amount of a sanction and/or fine payable to the Court,
16 or -- no clear and specific request was made. The
17 Courts do rely on the parties to propose matters, and
18 what I am going to do is I am not extending the time.
19 And I am not adverse, necessarily, to a daily sanction,
20 but I ask plaintiff's counsel to propose something
21 specific, what you are asking for in terms of a daily
22 fine.

23 And I can assume it's going to be something
24 that the defendants will view as very unappetizing, and
25 something that will be geared toward motivating them to

1 comply with the past Court orders, and not have this
2 ongoing delay. I denied the motion for extension. So
3 as soon as you can get that in I will take that up on an
4 expedited basis. But you need to propose the specifics
5 of this day-by-day sanction.

6 And I really hate being in this context.
7 This is really similar to a contempt proceeding when the
8 Court has to order -- in some cases of contempt, it's a
9 certain financial amount on a daily basis. But it's
10 very clear from the records filed before me and this
11 oral argument that the type of record keeping of Auto
12 Zone, these kinds of issues, the kind of spreadsheet
13 issues with underlying documents, these have gone on
14 since 2005.

15 The very same attorneys on the defense side
16 know about this. They have dealt with this same or
17 similar kinds of requests by plaintiff on the
18 plaintiff's side. And it's really outrageous that Court
19 time needs to be taken up on matters that should be
20 worked out by counsel.

21 And so make your proposal, Mr. Bailey, and
22 we will take that up when you present an order.

23 MS. ALPERN: May I be heard briefly. I
24 want to be sure we're crystal clear on what we need to
25 do. What we have and what we're prepared to produce are

1 the pay records for all of the employees, whether it's
2 150 or 200. And we Bates stamped them yesterday. I
3 sent over a protective order to Mr. Bailey's office, and
4 said, you know, is this agreeable able to you?

5 And the reason we sent the protective
6 order, of course, is this is just right now an
7 individual plaintiff case, and the records that we'll be
8 producing as payroll information has first names and
9 last names.

10 So what I had hoped was that Mr. Bailey's
11 office would agree to the protective order, and then
12 when we produced the documents tomorrow, without
13 violating any of these individual employee's privacy
14 rights by disclosing to an attorney who does not
15 represent those individuals' confidential information.

16 I am told that we may not get a signed
17 protective order by tomorrow. So it does put me in a
18 little bit of an awkward situation, because I don't want
19 to come before the Court, and I know you don't want me
20 to do that --

21 THE COURT: Yeah, you are right. Let me
22 say it's routine in this Court, it's been a routine
23 nationwide for years, for reasonable protective orders
24 to be negotiated between counsel and signed to protect
25 the obvious interests of the kinds of things you are

1 talking about. And I routinely approve protective
2 orders.

3 And, Mr. Bailey, I would be very surprised
4 if you are going to make an issue out of this, because
5 we need to start all becoming problem solvers here, and
6 not -- things cannot be going on that are going to
7 aggravate the situation, which is already really
8 aggravated. So is there a problem on this? Do I need
9 to be in on this, because I can't do too much more
10 hand-holding, frankly. I am too busy.

11 MR. BAILEY: I haven't read the protective
12 order that came over. I came into the office yesterday,
13 after being out of the state, at 1:30 in the afternoon,
14 and I had to prepare for both an argument this morning
15 at 8:30 on class summary judgment on a class case.

16 Having looked at it, counsel said to me in
17 counsel chambers -- or counsel table that there was one
18 there, and had I looked at it. And my response was I
19 have not. And my comment was, because the intimation
20 was we aren't going to get our documents until we have a
21 protective order, even though the Court ordered those
22 documents here tomorrow.

23 And I said, don't you think it's a little
24 late to send me a protective order the day before the
25 documents are due? And then are you telling me I am not

1 going to see those documents that were ordered until I
2 sign it? And I didn't get an answer on that.

3 THE COURT: Was this prior taken up? It
4 seems like when I order production, it's always
5 requested, if it's important, to get a protective order.
6 This is not an afterthought. Was that part of the
7 earlier order on production?

8 MR. BAILEY: No, Your Honor.

9 THE COURT: Then, Counsel, I mean, whatever
10 the order was, the order was. If you didn't ask for it,
11 I don't know if you are entitled to it or not. You are
12 basically telling me this is an afterthought, and we are
13 past the time for afterthought.

14 MS. ALPERN: I would never include in a
15 Request for Production of documents that contained
16 highly sensitive information about personnel
17 information, a protective order and get the Court
18 involved with that. Because it goes without saying, as
19 you suggested, that as the employer I can't turn over
20 that information unless I want to get the employees to
21 all sign off on it. I am trying to be efficient. I
22 sent over a protective order yesterday saying --

23 THE COURT: Was this dealt with prior to or
24 at the time of the March 7th hearing before me, or prior
25 to or at the time of the April 8th hearing before me?

1 Or at any other time before today?

2 MS. ALPERN: I do not know, but what I can
3 tell you --

4 THE COURT: Then the orders that I signed
5 are the orders that I signed. If you have some
6 afterthought now that you want to impose some additional
7 conditions on it, all I can tell you is the orders have
8 to be followed. And if your firm thinks now about some
9 new idea that you should have thought about in February
10 or March, then I am sorry. It's just what --

11 MS. ALPERN: This is not an afterthought.
12 In our response to the Request for Production of
13 documents, we say that the information that they are
14 asking for -- I just want to make sure that I don't make
15 any misstatements to the Court --

16 THE COURT: Counsel --

17 MS. ALPERN: Here it is --

18 THE COURT: This matter is not really
19 properly before the Court right now. I am looking again
20 at the motion for extension of time in which you went to
21 Judge Marshall and asked for expedited consideration,
22 and there's nothing about a protective order.

23 MS. ALPERN: No, no.

24 MS. COLLINGS-TIFT: That's absolutely
25 right.

1 THE COURT: I am sorry. This hearing is
2 over. We're already over time. I am supposed to have a
3 trial that started at 2:00, so please submit your order.

4 MS. COLLINGS-TIFT: Thank you, Your Honor.

5 MR. BAILEY: Thank you, Judge.

6 ENDING TIME: 2:11 P.M.

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FROM : COOK COURT REPORTING k

FAX NO. : 5035370339

May. 21 2008 04:22PM P3

Page 28

1 STATE OF OREGON)

2)Ss.

3 COUNTY OF YAMHILL)

4

5 I, Deborah L. Cook, RPR, Certified Shorthand

6 Reporter in and for the State of Oregon, hereby

7 certify that at said time and place I reported in

8 stenotype all testimony adduced and other oral

9 proceedings had in the foregoing hearing; that

10 thereafter my notes were transcribed by computer-aided

11 transcription by me personally; and that the foregoing

12 transcript contains a full, true and correct record of

13 such testimony adduced and other oral proceedings had,

14 and of the whole thereof.

15 Witness my hand and seal at Dundee, Oregon,

16 this 21st day of May, 2008.

17



21

22

23

24

25

DEBORAH L. COOK, RPR

Certified Shorthand Reporter

OREGON CSR #04-0389

CALIFORNIA CSR #12886

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EXHIBIT EPage 28

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Exhibit F

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April 28, 2008

VIA E-MAIL ONLY

Ms. Leigh Ann Tift
One Union Square
600 University St, Ste 3200
Seattle, WA 98101-3122

**Re: *Migis v. AutoZone, Inc.* (Multnomah Co. Circuit Court No. 0711-13531)
Defendant's Document Production / Un-numbered Time Record**

Ms. Tift:

Based upon a further review of the file, and deposition/declaration testimony in the *Joarnt* case, I'm writing to request that Defendant look again for and produce certain documents in the *Migis v. AutoZone* matter, such as all weekly schedules for Plaintiff Michael Migis, and all "Management Action Plan[s]." See Plaintiff's First Set of Request For Production Nos. 11, 13 - 14; and Second Set of Requests For Production 5 - 6. (I recall that in the *Joarnt* matter in late-January 2006, Judge Kantor ordered AutoZone to preserve all period boxes in the Oregon stores.)

Moreover, be advised that in response to Plaintiff's Second Set of Request For Production No. 4 and resulting Court Order, Defendant should have produced more than just the "Missed Lunch Reports" and "Lunch Variance Reports."

And by my own rough estimate, it appears that as of the end of the business day on April 24, 2008 (and in response to the Court's second order on Plaintiff's First Set of Requests For Production 2, 4 and 6), Defendant has yet to produce approximately 96 termination reports for employees listed on Bates Nos. AZ/MIGIS 0001212 - 1215.

Please advise by no later than the end of the business day on **Friday, May 2, 2008**, as to whether Defendant will produce any additional documents such as those referenced above. Be advised that in any event we will need to confer on these issues by no later than **May 7**. Thanks.

Sincerely,

/s/

Chey K. Powelson
Attorney for Plaintiff

EXHIBIT F
Page 1

Chey Powelson

From: Chey Powelson
Sent: Monday, April 28, 2008 2:42 PM
To: 'Tift, Leigh Ann C.'
Cc: Bud Bailey; Brad Griffin; Charity Shindle
Subject: Migis v. AutoZone -- Defendant's Document Production
Follow Up Flag: Follow up
Flag Status: Red
Attachments: To Defendant_Gaps in Document Production_04-28-2008.pdf

Ms. Tift:

See attached letter.

Chey K. Powelson

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Confidentiality Notice: This e-mail message may contain confidential and privileged information. If you have received this message by mistake, please notify me immediately via telephone, and do not review, disclose, copy, or otherwise distribute it. Thank you.

EXHIBIT F
Page 2

5/18/2008

Exhibit G

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

MICHAEL MIGIS, on behalf of himself and
all others similarly situated,

Plaintiffs,

v.

AUTOZONE, INC.,

Defendant.

Case No. 0711-13531

ORCP 39C(6) NOTICE OF
DEPOSITION (AFFIRMATIVE
DEFENSES)

ORCP 39C(5) REQUEST FOR
PRODUCTION OF DOCUMENTS

TO: AUTOZONE, INC., by and through your attorney, Douglas Parker, 1750 SW Harbor
Way, Ste 450, Portland OR 97201

PLEASE TAKE NOTICE that on May 15, 2008, commencing at 9:00 a.m., Plaintiff
will take the deposition of Defendant AutoZone, Inc., pursuant to ORCP 39C(6). The deposition
will be conducted at 1750 SW Harbor Way, Ste 450, Portland, Oregon, or some other local
location if agreed upon in advance by the parties. The deposition will be recorded by a licensed
and qualified court reporter, and may additionally be recorded by audio/videotape.

Plaintiff requests examination on the following matters:

1. All material facts related to Defendant's First Affirmative Defense that Plaintiff
fails to state any claim: (a) for which class-wide relief may be granted; and (b) for
which he may serve as an adequate class representative.

2. All material facts related to Defendant's **Second Affirmative Defense** that Plaintiff and the putative class members were treated fairly and in good faith and were paid all monies due and/or believed to be due. The amount and calculation of wages paid to Plaintiff and the putative class members were undertaken in accord with lawful business reasons and in good faith.
3. All material facts related to Defendant's **Third Affirmative Defense** that Plaintiff and the putative class members are estopped, in whole or in part, from claiming additional and/or unpaid compensation by reason of their actions, such as, but not limited to, failing to properly report compensable time.
4. All material facts related to Defendant's **Fourth Affirmative Defense** that Plaintiff and the putative class members' claims are barred in whole or in part by laches in that they unreasonably delayed in bringing forth their stated claims, to the extent meritorious, and Plaintiff's unreasonable delay caused hardship to AutoZone in defending the purported claims.
5. All material facts related to Defendant's **Fifth Affirmative Defense** that any and all wages unpaid are the subject to a bona fide, good faith dispute in that AutoZone has paid all wages that it knows or knew were due, and that AutoZone therefore should not be subject to the imposition of penalties.
6. All material facts related to Defendant's **Sixth Affirmative Defense** that Plaintiff fails to state a claim that meets, substantively, the pre-requisites of Oregon Civil Rule 32A and B, and therefore may not maintain this action as a class action lawsuit. Inquiry by deposition into this Defense will include:
 - a. The total number and location of AutoZone stores in the State of Oregon for the relevant period of time set forth in the Complaint;
 - b. The total number of full- and part-time hourly AutoZone employees in the State of Oregon for the relevant period of time set forth in the Complaint;

Page 2 -

ORCP 39C(6) NOTICE OF DEPOSITION OF DEFENDANT (AFFIRMATIVE DEFENSES)

EXHIBIT 6
Page 2

- c. The total number of hourly AutoZone employees in the State of Oregon whose employment terminated (voluntarily and/or involuntarily) during the relevant period of time set forth in the Complaint, including the total number of terminating employees who: (i) were involuntarily terminated; (ii) gave at least 48 hours' notice of their intent to quit employment; and (iii) voluntarily left employment without giving at least 48 hours' notice;
 - d. The total number of hourly AutoZone employees in the State of Oregon whose time records show one or more work weeks of more than 40 hours of work, during the relevant period of time set forth in the Complaint;
 - e. The total number of hourly AutoZone employees in the State of Oregon who delivered or picked up parts or other inventory, for the benefit of AutoZone, during the relevant period of time set forth in the Complaint, regardless of whether such delivery or pick up was part of their official job duties or description; and
 - f. All other material facts relating to Defendant's contention that class certification under ORCP 32A and B is not appropriate.
7. All material facts related to Defendant's **Eighth Affirmative Defense** that Plaintiff's and the putative class members' claims are barred in their entirety because their claims are currently pending in another matter, *Joarnt, et al. v. AutoZone, Inc.*; and that Plaintiff and many of the putative class members in this action are also putative class members in *Joarnt, et al. v. AutoZone, Inc.*
 8. All material facts related to Defendant's denials to Plaintiff's First Requests For Admission Nos. 1 - 3.
 9. The document(s) Bates-numbered AZ/MIGIS 0001212 - 1215, and related Bates-numbered document(s) AZ/MIGIS 0001216 - 1219, including the identity of all persons involved in the creation, review and/or modification of such document(s),

Page 3 -

ORCP 39C(6) NOTICE OF DEPOSITION OF DEFENDANT (AFFIRMATIVE DEFENSES)

EXHIBIT 6
Page 3

and the form and content of those document(s) (e.g., identification and meaning of all fields, sources of data found therein, and the definition of all PeopleSoft Action Codes).

10. The contents and authenticity of the documents Defendant has produced, as of the date of the deposition, during the course of this lawsuit.

11. The contents and authenticity of the documents as requested below.

NOTE: PURSUANT TO ORCP 39C(6), DEFENDANT'S HAS AN AFFIRMATIVE DUTY TO DESIGNATE, PREPARE AND PRODUCE THE PERSON(S) NEEDED TO TESTIFY AS TO THE TOPICS LISTED ABOVE. IF THE PERSON OR PERSONS PRODUCED DO NOT HAVE ADEQUATE KNOWLEDGE TO TESTIFY, PLAINTIFFS WILL SEEK APPROPRIATE REMEDIES, INCLUDING SANCTIONS.

Defendant should, by no later than five (5) business days prior to the date of this deposition, notify Plaintiff of each person designated, and the issue or issues on which such person will testify.

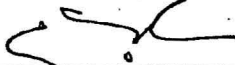
The deposition will continue from hour to hour and day to day until complete.

[CONTINUED ON NEXT PAGE]

ORCP 39C(5) REQUEST FOR PRODUCTION AT THE ABOVE-DESIGNATED
TIME AND PLACE (NOTE: See Attachment 1 for the definitions of "document" and
"electronic data"): (1) Produce all documents and electronic data containing all material facts and
reasons upon which Defendant relies to assert its First, Second, Third, and Fifth Affirmative
Defenses. (2) Produce in native electronic format all prior versions and drafts, if any, of the
document(s) Bates-numbered AZ/MIGIS 0001212 - 1215. (3) Produce Print Screens showing all
File Properties information for the Excel file which was a source for the document(s) Bates-
numbered AZ/MIGIS 0001212 - 1215.

SIGNED this 10th day of April 2008.

BAILEY, PINNEY & ASSOCIATES, LLC


A.E. "BUD" BAILEY, OSB 87157
CHEY POWELSON, OSB 03551
Attorneys for Plaintiffs

Page 5 -

ORCP 39C(6) NOTICE OF DEPOSITION OF DEFENDANT (AFFIRMATIVE DEFENSES)

EXHIBIT 6
Page 5

BAILEY PINNEY & ASSOCIATES LLC
Attorneys at Law
1498 SE Tech Center Place, Suite 290 • Vancouver, Washington 98683
(360) 567-2551 • Fax (360) 567-3331

ATTACHMENT 1

a. The term "document" or "documents" as used herein is to be construed broadly and shall mean any kind of hard copy and/or electronic written, recorded or graphic matter in any form of physical media, however produced or reproduced, of any kind of description, whether sent or received or neither, including originals, non-identical copies (whether different from the original because of marginal notes, or other material inserted therein or attached thereto, or otherwise), drafts and both sides thereof, including, but not limited to: agreements, communications, correspondence, telegrams, cables, telex messages, electronic mail messages ("e-mail"), memoranda, records, books, summaries of records or personal conversations or interviews, desk calendars, appointment books, diaries, journals, forecasts, statistical statements, tabulations, accountants' work papers, graphs, charts, accounts, analytical records, affidavits, minutes, records or summaries of meetings or conferences, reports or summaries of interviews or telephone conversations, reports or summaries of investigations, opinions or reports of consultants, appraisals, records, reports or trade letters, press releases, contracts, notes, projections, drafts of any documents, working papers, checks (front and back), check stubs or receipts, sound recordings, data processing records, microfilm, photographs, maps, financial statements or reports thereof, promissory notes, loan agreements, loan files and all notes contained with loan files, revolving credit agreements, deeds of trust, guaranty agreements or indemnification agreements, real estate contracts for sale or lease, pleadings, or any other documents or writings of whatever description, including any information contained in any computer (even if not previously printed out) within the custody or control of you or any of your employees, agents, including attorneys, accountants, investment bankers or advisors, or any other person acting or purporting to act on your behalf.

b. Produce all non-identical copies of all responsive documents including copies that bear marks, notations or changes not present on the original.

c. If any documents are withheld on grounds of attorney/client privilege or attorney work product immunity, identify the author, each recipient thereof, the nature of the document and the basis upon which the privilege is asserted.

d. If any document requested was, but no longer is in the possession, custody, or control of Defendant, or in existence, Plaintiff will inquire into whether the document (a) is missing or lost, (b) has been destroyed, (c) has been transferred, voluntarily or involuntarily, to others, or (d) has been otherwise disposed of. For each such instance, explain the circumstances surrounding such disposition, give the date or approximate date thereof, and the names and last known home and business addresses of these persons with knowledge of such circumstances.

e. "Defendant" as used herein refers to all parties named in this action, and all agents, employees or other persons with an interest in any party.

f. These Requests For Production are continuing and, in the event you discover further information that is responsive to them, you must supplement your responses. If you fail to supplement your responses in a reasonable fashion, requestor will move the Court for an order excluding from evidence at trial any matter which is responsive and not furnished.

g. The phrase "Electronic Data" includes information from Defendant's computer systems, removable electronic media and other locations. This further includes, but is not limited to, all documents, text files, e-mail and other electronic communication (including logs of e-mail history and usage, header information and "deleted" files), word processing documents, spreadsheets, databases, calendars, telephone logs, fax logs, alarm or security logs or records, video security or other tapes or recordings, contact manager information, internet usage files, backup files and tapes, image files, and network access information. This also includes data on personal, home or laptop computers of personnel containing potentially discoverable information. With respect to all of the above, produce the data in native file format with any metadata intact.

Exhibit H

COPY

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5 **IN THE CIRCUIT COURT OF THE STATE OF OREGON**
6 **FOR THE COUNTY OF MULTNOMAH**

7 **MICHAEL MIGIS**, individually, and on
8 behalf of all others similarly situated,

9 Plaintiff,

10 v.

11 **AUTOZONE, INC.**,

12 Defendant.

Case No. 0711-13531

(Filed as a Class Action)

13
14 **CASE MANAGEMENT ORDER**

15 **THIS MATTER** having initially been raised by the Court during hearing on March 7,
16 2008, and the parties having further discussed the dates set forth below, the Court hereby
17 **ORDERS** the following:

18 **1. Motions Schedule:**

19 a. **Class Certification:** Plaintiff's Motion for Class Certification will be filed and
20 served by no later than **August 15, 2008** (Friday). Defendant's opposition
21 briefing will be filed and served by no later than **September 8, 2008** (Monday).
22 Plaintiff's reply briefing will be filed and served by no later than **September 15,**
23 **2008** (Monday).

24 i. The Court will set and inform the parties as to the hearing date on said
25 Motion.

26 ///

Page 1 -

CASE MANAGEMENT ORDER

EXHIBIT H
Page 1

BAILEY PINNEY & ASSOCIATES LLC
Attorneys at Law

1498 SE Tech Center Place, Suite 290 • Vancouver, Washington 98683
(206) 567-8554 • Fax (206) 567-8804

- ii. The parties agree to service of any of the foregoing briefing by fax, and/or e-mail in .pdf format, with hard copy sent via either regular mail or hand delivery.
- iii. ORCP 32F(1) Notice (if necessary): Defendant will provide a class list by no later than 10 business days after the Court's ruling on Plaintiff's Motion for Class Certification.
- iv. ORCP 32F(2) Notice (if necessary): To be issued by no later than December 1, 2008.

2. Trial Date:

i. ☒ Plaintiff's proposal: April 1, 2009

ii. ☒ Defendant's proposal: January 12, 2009

To be set by Presiding Court. Both Counsel to appear at ex parte within 10 days to obtain trial date and to cooperate on setting ex parte date.

Changes to this Order proposed by the parties may be made in writing or upon motion, either by stipulation or good cause shown.

SIGNED this 14th day of May 2008.

[Signature]
The Hon. Jerome LaBarre
Multnomah County Circuit Court

APPROVED AS TO FORM:

A.E. "BUD" BAILEY, OSB NO. 87157
Bbailey@wagelawyer.com
CHEY K. POWELSON, OSB NO. 03551

1 Cpowelson@wagelawyer.com
1498 SE Tech Ctr Pl, Ste 290
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3 Vancouver, WA 98683
Attorneys for Plaintiff
4

5 APPROVED AS TO FORM (CONT.)
6

7
8 DOUG PARKER, OSB NO. 821017
NEIL OLSEN, OSB NO. 053378
1750 SW Harbor Way, Ste 450
9 Portland, OR 97201
Phone: 503.221.0309
10 Fax: 503.242.2457
Attorneys for Defendant
11

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EXHIBIT H
Page 3

Page 3 -

CASE MANAGEMENT ORDER

Exhibit I

Deposition of MARK DESSEM, taken on August 25, 2005

Page 1

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

RICHARD JOARNT AND BERT YAMAOKO,
individually, and on behalf of all
others similarly situated.

PLAINTIFFS

VS.

NO. 0503-02795

AUTOZONE, INC., a Foreign Corporation

DEFENDANT

DEPOSITION OF MARK DESSEM

TAKEN AT THE INSTANCE OF THE PLAINTIFFS
IN THE OFFICES OF THE SHELBY COUNTY COURTHOUSE
40 ADAMS AVE. RM 228, MEMPHIS, TENNESSEE
ON AUGUST 25, 2005, BEGINNING AT 8:55 A.M.

(APPEARANCES NOTED HEREIN)

Reported by: REGINA D. RUSSELL, CSR 1110

ADVANCED COURT REPORTING
P.O. BOX 761
TUPELO, MS 38802-0761
(662) 690-1500

Deposition of MARK DESSEM, taken on August 25, 2005

Page 2

1 APPEARANCES:

2 For the Plaintiffs: A. E. BUD BAILEY, ESQUIRE
Bailey, Pinney & Associates, LLC
3 Columbia Tech Center
1498 SE Tech Center Place
4 Suite 290
Vancouver, Washington 98683
5 (360) 567-2551
6

For the Defendant: LEIGH ANN COLLINGS TIFT, ESQUIRE
7 Littler Mendelson
701 Fifth Avenue, Suite 6500
8 Seattle, Washington 98104-7097
(206) 623-3300
9

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Deposition of MARK DESSEM, taken on August 25, 2005

Page 65

1 Q. What's the procedure if someone quits in
2 Oregon?

3 A. We receive a phone call from field
4 operations or the store manager, human resources,
5 field or human resources. They call us up and say so
6 and so -- employment -- he's either quitting, he's
7 been terminated, and they order a final check.

8 Q. And what is your -- what happens in your
9 office?

10 A. We immediately write up a check request and
11 that check leaves the same day and is sent out
12 overnight mail, FedEx.

13 Q. FedEx?

14 A. Yes.

15 Q. Back to --

16 A. Back to that store.

17 Q. Back to that store.

18 A. Or, if some reason, human resource, you
19 know, is doing the termination at a different store
20 for some reason, you know -- there are times where it
21 may go to another store, but it's going out to the
22 stores.

23 Q. Okay. And the triggering process there is
24 a phone call from someone?

25 A. Yes.

Deposition of MARK DESSEM, taken on August 25, 2005

Page 68

1 did it. The "H" is what we key off as, meaning that
2 is an hourly pay group.

3 Q. And the pay period ends 10/23/2004. That
4 just means that's the last day of the pay period?

5 A. Yes.

6 Q. And the issue date here is 10/22/2004?

7 A. Yes.

8 Q. I note that it's got a box checked, says
9 "off cycle."

10 A. Yes.

11 Q. What does that mean?

12 A. That means this was a manual check that we
13 issued.

14 Q. And when it's a manual check, is there
15 someone that does a -- why don't you tell me, how
16 does this manual check get done physically? What goes
17 on?

18 A. Again, it starts with the phone call. That
19 person writes up a check request based on the
20 information that we're given, and that check request
21 is given to someone else in payroll who's responsible
22 for issuing manual checks. They key it in, process
23 the check that same day, FedEx the check out that
24 same day, and it arrives the next day.

25 Q. The date that the check was issued is the

Deposition of MARK DESSEM, taken on August 25, 2005

Page 69

1 date that it was actually printed in payroll?

2 A. No. The issue date is the date that the
3 check is going to arrive.

4 Q. So this check then would have been
5 theoretically put together on the 21st?

6 A. Yes.

7 Q. And so it's dated for the date that it's
8 anticipated that it gets to the store.

9 A. Yes.

10 Q. Okay. If I look down at the screen, it
11 says, a little further down under the box that says
12 "earnings?"

13 A. Uh-huh (Indicating yes).

14 Q. It says "Regular 62.65."

15 A. Correct.

16 Q. How does that -- how do those hours get
17 transmitted to the person who's doing the handcut
18 check?

19 A. Well, the person that's doing the handcut
20 check is working off of the check request that is
21 given to them. The check request is written up by
22 the person that has taken the phone call. And they
23 are going to get this data from one of two places.
24 In this particular case, first week hours had already
25 been transmitted, because we're into the second -- in

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

RICHARD JOARNT AND BERT YAMAOKO,
individually, and on behalf of all
others similarly situated PLAINTIFFS

VS. NO. 0503-02795

AUTOZONE, INC., a Foreign Corporation DEFENDANT

DEPOSITION OF MARK DESSEM

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ON AUGUST 25, 2005, BEGINNING AT 8:55 A.M.

(APPEARANCES NOTED HEREIN)

Reported by: REGINA D. RUSSELL, CSR 1110

ADVANCED COURT REPORTING
P.O. BOX 761
TUPELO, MS 38802-0761
(662) 690-1500

ORIGINAL

C E R T I F I C A T E

STATE OF MISSISSIPPI)

COUNTY OF LEE)

RE: ORAL DEPOSITION OF MARK DESSEM

I, Regina D. Russell, CSR 1110, a Notary Public within and for the aforesaid county and state, duly commissioned and acting, hereby certify that the foregoing proceedings were taken before me at the time and place set forth above; that the statements were written by me in machine shorthand; that the statements were thereafter transcribed by me, or under my direct supervision, by means of computer-aided transcription, constituting a true and correct transcription of the proceedings; and that the witness was by me duly sworn to testify to the truth and nothing but the truth in this cause.

I further certify that I am not a relative or employee of any of the parties, or of counsel, nor am I financially or otherwise interested in the outcome of this action.

Witness my hand and seal on this 1st day of September, 2005.



My Commission Expires: May 27, 2008

CSR 1110
Notary Public

Exhibit J

AutoZone

Store Handbook

Relentlessly creating the most exciting Zone for vehicle solutions!

EXHIBIT 5
Page 1

AZ/MIGIS 0001621

Your Pay, Records and Benefits

Overview

Contents Pay, records and benefits topics are listed below.

Topic	See Page
Your Pay	47
Your Personnel Records	48
Rewards & Performance Management (RPM)	49
Benefit Plans	50
Vacation	54
Other Paid Time Off	55
Leaves of Absence	56

Your Pay

Introduction

AutoZone is paid every two weeks (unless regulated by different state requirements). You are provided with a summary of wages and deductions – those required by law and those authorized by you. You are encouraged to review your check carefully and advise your manager if you have any questions or concerns.

Electronic Transfer

In selected states, AutoZone mandates the use electronic-transfer pay options. Options include:

- direct deposit – recommended if you have a personal bank account; and
- the pay card – available even if you do not have a personal account.

How to Enroll

In states that allow AutoZone to mandate electronic-transfer pay, ask your manager for

Instructions

- instructions to enroll in direct deposit using the WITT-JR at your store; or
- a pay card enrollment kit including a Cardholder Agreement that must be signed and mailed as instructed.

AZ/MIG/IS 0001646

EXHIBIT 5/2
Page

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3 **IN THE CIRCUIT COURT OF THE STATE OF OREGON**
4 **FOR THE COUNTY OF MULTNOMAH**

5
6 **MICHAEL MIGIS**, individually and on behalf
7 of all others similarly situated,

Case No. 0711-13531

8 Plaintiff,

9 v.

**STIPULATED PROTECTIVE
ORDER**

10
11 **AUTOZONE, INC.**, a Nevada corporation,

12 Defendant.
13

14 THE PARTIES TO THE ABOVE-ENTITLED ACTION, hereby stipulate and agree to
15 the following protective order, subject to approval by the Court:

16 1. Definitions of terms used in this Stipulated Protective Order ("SPO") are as follows:

- 17 a. "Confidential" refers to: (i) personal information of natural persons, including
18 medical information, driver's license numbers, dates of birth, Social Security
19 Numbers, financial account numbers, and any other information set forth in
20 Uniform Trial Court Rule 2.100; and (ii) business trade secrets, the disclosure
21 of which would work a clearly defined and serious injury. See *Citizens' Util.*
22 *Bd. v. Oregon Pub. Util. Comm'n*, 128 Or App 650, 658, rev. denied, 320 Or
23 272 (1994).
- 24 b. "Document" refers to any hard copy or electronic document or file produced by
25 any party in this action or third party in response to compulsory process (e.g.,
26 subpoena *duces tecum* or Court order) or pursuant to ORCP 43 (and as

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“document” and “electronic data” are defined by the parties in their discovery requests); e-mail (including attachments, if any) in hard copy or electronic form; deposition transcripts and exhibits; or any and all other written, printed, typed, punched, taped, filmed, or graphic matter or tangible thing, however produced or reproduced.

2. Any party may designate documents produced in this lawsuit as “Confidential” by stamping or typing the designation on the face of the documents produced. Notwithstanding the foregoing, a cover letter may be used to designate certain materials, such as computer data, where stamping would be impossible. Transcripts of deposition or other testimony shall be designated by reference to the page and lines being designated. Designation of deposition materials shall be made within 10 days after the transcript of such deposition or hearing is available; or (b) a reasonable extension of any applicable time period may be agreed to in writing among counsel for the parties. If a party inadvertently produces documents bearing an improper designation, the producing party may re-designate such documents by providing written notice to the receiving party within a reasonable time after discovering the inadvertent production. Upon such notice, the receiving party shall treat the documents according to the new designation.
3. “Confidential” documents may be seen only by:
 - a. the Court and its personnel;
 - b. each party’s attorneys and the staff of those attorneys;
 - c. independent experts and consultants;
 - d. court reporters, videographers, commercial copy services, translators, demonstrative exhibit preparers, trial consultants, and data and computer support organizations hired by and assisting the attorneys for any party;
 - e. any natural person or legal entity from whom testimony is taken, where such

Page 2 -

STIPULATED PROTECTIVE ORDER**BAILEY PINNEY & ASSOCIATES LLC**

Attorneys at Law

1498 SE Tech Center Place, Suite 290 • Vancouver, Washington 98683
 (360) 567-2551 • Fax (360) 567-3331

P. 02

FAX NO. 5039885773

JUN-04-2008 WED 10:54 AM CIRCUIT COURT ADMIN

1 person was an author or recipient of the designated document, or which relates
 2 to that person, or where counsel for the designating party has, either before or
 3 during the deposition, approved the disclosure of such documents to that
 4 person, except that such person may not retain any such documents; and
 5 f. current and former individual parties and officers, directors and employees of
 6 any party.
 7 g. Neither the "Confidential" documents nor information contained therein shall
 8 be disclosed to other persons; such documents may be shown only to the above-
 9 described people or entities when disclosure is necessary for purposes of this
 10 lawsuit, and said persons are given a copy of this Protective Order and sign an
 11 acknowledgment on a copy of this Order stating they have read the Order and
 12 agree to be bound by its terms.

- 13 4. Nothing herein shall impose any restrictions on the use or disclosure by a party of
 14 documents or portions of documents obtained by such party, independent of
 15 discovery from a party in this action, whether or not such documents or portions are
 16 also obtained through discovery in this action, or from disclosing its own
 17 "Confidential" documents or portions of documents as that party deems appropriate.
 18 Nor shall this Order restrict the use or disclosure of documents or portions of
 19 documents that: (a) are in the public domain at the time of use or disclosure; (b)
 20 become part of the public domain after the time of the use or disclosure, through no
 21 fault of the receiving party; (c) were received from a third party under no obligation
 22 of confidentiality; (d) agreed to in advance in writing by all parties; or (e) are derived
 23 or obtained independently of the use or disclosure. The receiving party shall have the
 24 burden of proving that the use or disclosure satisfies one or more of these criteria.
 25 5. If any party or individual who has received documents designated as "Confidential"
 26 is served with a subpoena or other judicial process demanding production or

disclosure of the documents, the receiving party or individual: (a) shall provide all parties to the lawsuit with a copy of the subpoena or other judicial process within 10 days following receipt thereof; (b) shall inform the subpoenaing party that the requested documents are governed by the terms of this Order; and (c) shall not disclose or produce "Confidential" documents unless (i) the subpoenaed party receives written permission from the designating party, or (ii) the designating party fails to file a motion to protect disclosure of such documents within 15 days of being given notice of the request. This provision does not apply to those documents that can be redacted of "Confidential" information prior to production.

6. This Order shall not restrict disclosure of "Confidential" documents to the Court, its personnel, or any appellate court in accordance with this Paragraph. All materials filed with the Court that include documents generally designated "Confidential," or information taken from such documents, shall be filed with any personal confidential or trade secret information redacted before submission to the Court (thereby rendering the document disclosable into the public record). To the extent redaction is not possible, the parties agree to file "Confidential" documents under seal pursuant to the applicable Court rules and/or procedure, PROVIDED however, that the party moving to file documents under seal sets forth a specific description of particular or categories of documents they seek to protect, and a clear statement of the facts justifying a seal and overcoming the strong presumption in favor of public access to court records. The facts supporting any motion to seal must be supported by declaration or affidavit. To obtain a court order sealing documents attached to or for use in a non-dispositive motion, the parties must make a particularized showing under the "good cause" standard set forth in ORCP 36C. To obtain a court order sealing documents attached to a dispositive motion, such as for summary judgment, the parties must meet a "compelling reasons" standard and not the lesser ORCP 36C

BAILEY PINNEY & ASSOCIATES LLC

Attorneys at Law

1498 SE Tech Center Place, Suite 290 • Vancouver, Washington 98683
(360) 567-2551 • Fax (360) 567-3331

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1 "good cause" standard, as court records relating to dispositive motions especially are
2 presumptively public.

3 7. Any receiving party disagreeing with the producing party's initial or subsequent
4 "Confidential" designation must confer with the producing party in an effort to
5 resolve the issue. If the parties cannot reach agreement, the receiving party may file
6 a motion to challenge the designation, but the designating party retains the "good
7 cause" or "compelling reasons" burden to establish that the document or category of
8 documents are "Confidential."

9 8. This Order in no way limits the permissible scope of discovery under ORCP 36, nor
10 shall it be deemed a waiver of any party's rights to oppose discovery on any grounds.
11 This Order shall not foreclose the parties from applying to the Court for further or
12 additional protective orders. In addition, the parties may agree among themselves to
13 the modification of this Order, subject to approval of the Court.

14 9. The Court signing this Order may change the terms of this Order, on motion by any
15 party or on its own motion after notice to the parties and an opportunity to be heard.

16 SIGNED this 27 day of May 2008.

17
18 **JEAN K. MAURER**

19 ~~THE HON. JEROME LABARRE~~
MULTNOMAH CO. CIRCUIT COURT

20 APPROVED AS TO FORM:

21 BAILEY, PINNEY & ASSOCIATES, LLC

LITTLER MENDELSON, PC

22
23 A.E. "BUD" BAILEY, OSB NO. 87157
24 bbailey@wagelawyer.com
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25 Phone: 360.567.2551
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26 Attorney for Plaintiff

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One Union Square
600 University St, Ste 3200
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Phone: (206) 623-3300
Fax: (206) 447-6965
Of Attorney for Defendant

Page 5 -

STIPULATED PROTECTIVE ORDER

BAILEY PINNEY & ASSOCIATES LLC

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P. 05

FAX NO. 5039885773

JUN-04-2008 WED 10:55 AM CIRCUIT COURT ADMIN

1
2 **IN THE CIRCUIT COURT OF THE STATE OF OREGON**
3
4 **FOR THE COUNTY OF MULTNOMAH**
5

6 MICHAEL MIGIS, individually, and on
7 behalf of all other persons similarly
8 situated,

9 Plaintiff,

10 vs.

11 AUTOZONE INC., a Nevada
12 Corporation,

13 Defendant.

No. 0711-13531

**DECLARATION OF LEIGH ANN TIFT IN
SUPPORT OF DEFENDANT'S
OPPOSITION TO PLAINTIFF'S MOTION
TO ENFORCE COURT ORDER**

DATED: JULY 11, 2008

14 I, Leigh Ann Collings Tift, hereby declare as follows:

15 1. I am an attorney representing Autozone Inc. in the above-captioned matter, and I
16 make this declaration in support of Defendants' Opposition to Plaintiff's Motion to Enforce Court
17 Order. I have personal knowledge of the statements contained herein.

18 2. Attached as **Exhibit 1** to this Declaration is a true and correct excerpt of Defendant's
19 Fourth Supplemental Responses to Plaintiff's Requests for Admission 1-3 and First Requests for
20 Production.

21 3. In addition to the summary chart of terminated employees, the documents produced
22 by AutoZone in response to Plaintiff's first Requests for Production were termination reports for
23 employees who terminated in the period November 2006 to November 2007, paycheck data for all
24 employees who terminated between November 2006-2007, and AutoZone's store handbook, a memo
25
26

**DEC OF L. TIFT ISO OF DEF'S OPP. TO
PLAINTIFF'S MTN TO ENFORCE
COURT ORDER**

1

Little Mendelson, PC
600 University Street, Suite 3200
Seattle, WA 98101

Phone: 206-623-3300 Fax: 206-447-6965

85452265

1 from Mark Dessem, AutoZone's Director of Payroll, a memo from AutoZone's Director of Payroll
2 (who is responsible for all payroll functions) reminding field officers of "our policy to call in all
3 Oregon terminations on a timely basis so that we may issue the appropriate manual check for their
4 final pay," and training materials for managers, which provide, in relevant part, that dismissal of an
5 employee cannot take place on the spot. A copy of a recent letter from Ms. Alpern, outlining the
6 efforts AutoZone has undertaken to respond to Plaintiff's discovery demands and requests for
7 conferences is attached as **Exhibit 2** to this Declaration.

9 4. Attached as **Exhibit 3** to this Declaration is a true and correct excerpt of Excerpt of
10 March 8, 2008 transcript of a hearing before this Court relating to Defendant's production of
11 documents.

12 5. On April 22, 2008, after the Court denied AutoZone's request for an extension of
13 time to produce termination reports, AutoZone made an extraordinary effort to find all termination
14 reports, and did so principally on April 23, 2008, the date ordered by the Court, with the remainder
15 of all documents that could be found on April 24. More than half of the reports cannot be located.
16 However, that is not the result of negligence or a failure to search. AutoZone's store managers, the
17 Regional HR manager, and I have searched period boxes in the stores and all personnel files for each
18 terminated employee. Based upon the testimony of AutoZone's former Regional HR Manager,
19 Nicole McCollum, whose deposition was taken by Plaintiff's counsel in the matter of Joarnt v.
20 AutoZone, it is my understanding that the reports can be printed at the time they are filled out, but
21 not necessarily after the information is sent to AutoZone's corporate records. Attached to this
22 Declaration as **Exhibit 4** is a true and correct excerpt of the deposition transcript of Ms. McCollum,
23
24
25
26

1 pages 96 and 97. Plaintiff's Counsel in this matter, Mr. Bailey, was attorney for Plaintiffs Joarnt and
 2 Yamaoka, and examined Ms. McCollum.

3 6. Attached as **Exhibit 5** to this Declaration is a true and correct excerpt of the
 4 deposition transcript of Plaintiff, Michael Migis, pages 106, 110, 113, 116, and 169.

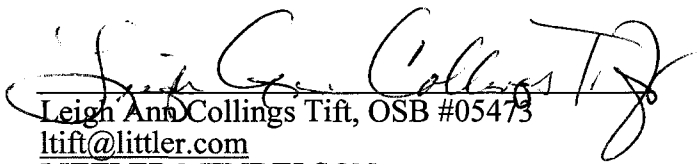
5 7. Attached as **Exhibit 6** to this Declaration is a true and correct copy of the termination
 6 report prepared for Mr. Migis. The document was produced in response to Plaintiff's discovery
 7 requests, and is Bates numbered 0001347.

8 8. Attached as **Exhibit 7** to this Declaration is a true and correct copy of a Manager's
 9 Training Handbook, page 109. The document was produced in response to Plaintiff's discovery
 10 requests, and is Bates numbered 0002177.

11 9. Attached as **Exhibit 8** to this Declaration is a true and correct excerpt of the
 12 deposition of Carlos Jon, pages 90, 92 and 103.

13 10. Attached as **Exhibit 9** to this Declaration is a true and correct copy of a termination
 14 report, produced in response to Plaintiff's discovery requests. The document is Bates numbered
 15 0001819.

16
 17
 18
 19
 20
 21 Dated: June 5, 2008

22 
 23 Leigh Ann Collings Tift, OSB #05473
 24 ltift@littler.com
 25 LITTLER MENDELSON
 26 A Professional Corporation

Attorneys for Defendant
 AUTOZONE, INC.

CERTIFICATE OF SERVICE

I hereby certify that on June 5th, 2008, I served a full, true, and correct copy of the following document:

**DECLARATION OF LEIGH ANN TIFT IN SUPPORT OF DEFENDANT'S
OPPOSITION TO PLAINTIFF'S MOTION TO ENFORCE COURT ORDER**

as indicated below:

- ☐ By delivery via messenger, or otherwise by hand,
☒ By facsimile,
☐ By e-mail,
☒ By mailing same, postage paid,

addressed to:

Bailey Pinney & Associates LLC
Attorneys at Law
1498 SE Tech Center Place
Suite 290
Vancouver, WA 98683
Fax (360) 567-3331

Of Attorneys for Plaintiff

By


Savanna L. Stevens

Firmwide:85446067.1 013306.2124

EXHIBIT 1

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

MICHAEL MIGIS, individually, and on
behalf of all other persons similarly
situated,,

Plaintiff,

vs.

AUTOZONE INC., a Nevada
Corporation,,

Defendant.

No. 0711-13531

***DEFENDANT'S FOURTH SUPPLEMENTAL
OBJECTIONS AND RESPONSES TO
PLAINTIFF'S FIRST SET OF REQUESTS
FOR PRODUCTION OF DOCUMENTS***

Defendant AutoZone, Inc. ("Defendant") hereby submits its supplemental objections and responses to Plaintiff's First Set of Requests for Production of Documents as follows:

SUPPLEMENTAL GENERAL OBJECTIONS

The following objections apply generally to all of Plaintiff's discovery requests in this lawsuit:

(a) Objections to Scope of Discovery Requests. Defendant objects to all discovery requests to the extent they purport to require any actions not required by the Oregon Rules of Civil Procedure, the Uniform Trial Court Rules, or any local rules. Without limiting the generality of this objection, Defendant objects to all discovery requests to the extent that they (1) go beyond the scope of discovery provided by the Oregon Rules of Civil Procedure, (2) are not reasonably calculated to lead to the discovery of admissible evidence, and/or (3) purport to impose a duty of supplementation greater than that imposed by the Oregon Rules of Civil Procedure.

(b) Privilege and Trial Preparation Materials. Defendant objects to all discovery requests to the extent they call for information or documents that fall within any relevant privilege (including

1 **SPECIFIC OBJECTIONS AND RESPONSES**

2 **REQUEST FOR ADMISSION NO. 1:** Admit that Defendant failed to pay all wages
3 earned and unpaid by the end of the first business day after termination, to at least one involuntarily
4 terminated employee within the 12 months preceding the date of the filing of this lawsuit.

5 **FIRST SUPPLEMENTAL RESPONSE:** Defendant incorporates by reference its General
6 Objections as though fully set forth herein and its specific objections to this request in Defendant's
7 Objections to Plaintiff's First Set of Requests for Production of Documents. Defendant further
8 objects to this request to the extent it is unduly burdensome and overbroad, is not limited to
9 employees who worked in the State of Oregon, seeks information that is beyond scope of proper pre-
10 certification discovery, and seeks information about individuals other than Plaintiff Migis. Plaintiff
11 Migis was not involuntarily terminated. Without waiving its objections, Defendant has not
12 knowingly failed to pay any employee final wages on time, is unaware of any instance where it has
13 done so, and therefore denies this Request on that basis. Defendant further asserts that its policies
14 and procedures intend that employees be paid final wages within the time frames set out in the
15 applicable Oregon statutes.

16 **THIRD SUPPLEMENTAL RESPONSE:** Defendant incorporates by reference its General
17 Objections as though fully set forth herein and specific answer and objections to this RFA as set
18 forth above. Without waiving such objections, see, Response to RFP No. 2.

19 **REQUEST FOR PRODUCTION NO. 1:** If Defendant admits RFA No. 1, produce all
20 documents and electronically stored information for all involuntarily terminated employees to whom
21 Defendant failed to pay all wages earned and unpaid by the end of the first business day after
22 termination, within the referenced time period. Produce documents and electronically stored
23 information in electronic format. If electronic format is not available, produce in original format.
24 This request includes, but is not limited to, Documents and Electronic Data as defined above.
25
26

1 **FIRST SUPPLEMENTAL RESPONSE:** Defendant incorporates by reference its General
 2 Objections as though fully set forth herein and its specific objections to this request in Defendant's
 3 Objections to Plaintiff's First Set of Requests for Production of Documents. Defendant further
 4 objects to this request to the extent it unduly burdensome and overbroad, is not limited to employees
 5 who worked in the State of Oregon, seeks information that is beyond class certification issues, and
 6 seeks information about individuals other than Plaintiff Migis. Finally, Defendant objects to the
 7 request for electronically stored information as overbroad and unduly burdensome given that any
 8 need for such information is outweighed by the burden to Defendant of searching its electronic
 9 records. Without waiving its objections, see Answer to RFA 1.

10 **THIRD SUPPLEMENTAL RESPONSE:** Defendant incorporates by reference its General
 11 Objections as though fully set forth herein and its specific answer and objections to this RFP as set
 12 forth above. Without waiving such objections, see, Response to RFP No. 2.

13 **REQUEST FOR PRODUCTION NO. 2:** If Defendant denies RFA No. 1, produce all
 14 documents and electronically stored information for all involuntarily terminated employees within
 15 the referenced time period which Defendant relies upon to support its denial. Produce documents
 16 and records in electronic format. If electronic format is unavailable, produce in original format.
 17 This request includes, but is not limited to, Documents and Electronic Data as defined above.

18 **FIRST SUPPLEMENTAL RESPONSE:** Defendant incorporates by reference its General
 19 Objections as though fully set forth herein and its specific objections to this request in Defendant's
 20 Objections to Plaintiff's First Set of Requests for Production of Documents. Defendant further
 21 objects to this request to the extent it unduly burdensome and overbroad, is not limited to employees
 22 who worked in the State of Oregon, seeks information beyond the proper scope of pre-certification
 23 discovery, and seeks information about individuals other than Plaintiff Migis. Defendant also
 24 objects to the request for electronically stored information as overbroad and unduly burdensome
 25
 26

1 given that any need for such information is outweighed by the burden to Defendant of searching its
2 electronic records.

3 **SECOND SUPPLEMENTAL RESPONSE:** With respect to Plaintiff Migis, Defendant
4 maintains that Plaintiff has all relevant documents; to wit, Plaintiff's final paycheck and Plaintiff's
5 personnel file reflecting the date his employment ended with AutoZone.

6 **THIRD SUPPLEMENTAL RESPONSE:** Defendant incorporates by reference its General
7 Objections as though fully set forth herein and its specific answer and objections to this RFP as set
8 forth above. Without waiving such objections, *see*, documents previously produced to Plaintiff (i.e.,
9 those labeled AZ/Migis 000001-0001655), documents attached hereto, labeled AZ/Migis 0001656-
10 0001863, and electronic information provided on disk, labeled AZ/Migis 3rd Supplemental.

11 **FOURTH SUPPLEMENTAL RESPONSE:** Defendant incorporates by reference its
12 General Objections as though fully set forth herein and its specific answer and objections to this RFP
13 as set forth above. Without waiving such objections, *see*, AZ/Migis 001864-0001881.

14 **REQUEST FOR ADMISSION NO. 2:** Admit that Defendant failed to immediately pay
15 all wages earned and unpaid to at least one employee who gave not less than 48 hours' notice of their
16 intention to quit, within the 12 months preceding the date of the filing of this lawsuit.

17 **FIRST SUPPLEMENTAL RESPONSE:** Defendant incorporates by reference its General
18 Objections as though fully set forth herein and its specific objections to this request in Defendant's
19 Objections to Plaintiff's First Set of Requests for Production of Documents. Defendant further
20 objects to this request to the extent it unduly burdensome and overbroad, is not limited to employees
21 who worked in the State of Oregon, seeks information that is beyond the proper scope of pre-
22 certification discovery, and seeks information about individuals other than Plaintiff Migis. Without
23 waiving its objections and limiting its response to Plaintiff Migis, Defendant has not knowingly
24 failed to pay any employee final wages on time, is unaware of any instance where it has done so, and
25 therefore denies this Request on that basis. Defendant further asserts that its policies and procedure
26

1 intend that employees be paid final wages within the time frames set out in the applicable Oregon
2 statutes.

3 **THIRD SUPPLEMENTAL RESPONSE:** Defendant incorporates by reference its General
4 Objections as though fully set forth herein and specific answer and objections to this RFA as set
5 forth above. Without waiving such objections, see, Response to RFP No. 2.

6
7 **REQUEST FOR PRODUCTION NO. 3:** If Defendant admits RFA No. 2, produce all
8 documents and electronically stored information for all employees who gave not less than 48 hours'
9 notice of their intention to quit, to whom Defendant failed to pay all wages earned and unpaid
10 immediately at the time of quitting, within the referenced time period. Produce documents and
11 electronically stored information in electronic format. If electronic format is unavailable, produce in
12 original format. This request includes, but is not limited to, Documents and Electronic Data as
13 defined above.

14 **FIRST SUPPLEMENTAL RESPONSE:** Defendant incorporates by reference its General
15 Objections as though fully set forth herein and its specific objections to this request in Defendant's
16 Objections to Plaintiff's First Set of Requests for Production of Documents. Defendant further
17 objects to this request to the extent it unduly burdensome and overbroad, is not limited to employees
18 who worked in the State of Oregon, seeks information that is beyond class certification issues, and
19 seeks information about individuals other than Plaintiff Migis. Defendant also objects to the request
20 for electronically stored information as overbroad and unduly burdensome given that any need for
21 such information is outweighed by the burden to Defendant of searching its electronic records.
22 Without waiving its objections and limiting its response to Plaintiff Migis, *see* Answer to RFA 2.

23 **SECOND SUPPLEMENTAL RESPONSE:** With respect to Plaintiff Migis, Defendant
24 maintains that Plaintiff has all relevant documents; to wit, Plaintiff's final paycheck and Plaintiff's
25 personnel file reflecting the date his employment ended with AutoZone.
26

EXHIBIT 2



June 3, 2008

Amy R. Alpern
Direct: 503.889.8878
Direct Fax: 503.914.1816
aalpern@littler.com

VIA MAIL AND FACSIMILE 360-567-3331 AND U.S. MAIL

Chey Powelson
Bailey Pinney & Associates, LLC
1498 SE Tech Center Place, Suite 290
Vancouver, WA 98683

Re: Migis v. AutoZone, Inc.
Multnomah County Circuit Court Case No. 0711-13531

Dear Chey:

This follows up on my May 23, 2008 letter to you in which I outlined what we were willing to do to resolve the outstanding discovery issues. In that letter I told you that I would get back to you by June 3, and I am now doing so. For reasons that cause me great concern, you continued to file motions to compel, and to ask for yet additional documents, while we are diligently working to produce those items outlined in my May 23 letter. Indeed, I do believe at this point that you are intentionally making things more difficult than they need to be. For example, I prepared a protective order and asked that you sign it. (I told you that the form of protective order I prepared had been approved by the Multnomah County Presiding Court.) Rather than signing my order, you sent me a different order and required that we submit that order, instead. I did not want to fight about the issue, so I agreed to sign your proposed order and then brought it to the scheduling conference to ask the Court to sign it per our discussion on May 23. When I asked you to sign the order at that scheduling conference, you said you could not do so because you prepared it for Mr. Bailey's signature. I then asked Mr. Bailey, who was also at the scheduling conference, to sign it. He said he could not do so because he had not read it. When I pointed out to him that it was on your firm's letterhead, and urged him to sign it, he finally agreed to do so. However, when I presented it to Judge Maurer at the scheduling conference, she had concerns about the language in the order and asked her assistant to review it. As it now stands, we do not have a signed protective order.

I have now enclosed another protective order that complies with the Multnomah County rules. I signed it, ask that you do so, and ask that you forward it to the Presiding Court.

Moving on to my May 23, 2008 letter, I respond as follows:

1. We agreed to allow you to depose Mark Dessem as a corporate representative pursuant to ORCP 39(c)(6) even though you have already taken one 39(c)(6)

Chey Powelson
June 3, 2008
Page 2

deposition. We believe that Mr. Dessem is likely to be able to address some of the issues set forth in the 39(c)(6) notice that took place on May 15, 2008.

I also told you at the May 15 deposition that we would provide you with additional information regarding the total number of full- and part-time hourly AutoZone employees for the time periods set forth in your notice. We reviewed the W-2s for 2006 and can advise you that AutoZone employed 423 employee in Oregon that year. As you recall, we have already provided you with this information for the year 2007. I am still working on 2004 and 2005 and will respond to that request, although I am told that the information is on the payroll tax reports that were produced to your firm in the Joarnt matter. Nonetheless, I will review those reports as well, and get our answer to you promptly.

2. As I suspected, the reference to "attendance calendars" in Mr. Jon's deposition is, in fact, a reference to the variance reports. Since we have already produced the variance reports, we have already satisfied this request.

With respect to Request for Production No. 5 (weekly schedule reports referencing Mr. Migis' work schedule, both approved and unapproved, for three years prior to the filing of the complaint), we have now double-checked the period boxes for the two stores in which Mr. Migis worked in Oregon and can confirm that no additional records responsive to this request exist.

We also agreed to send you a screen print of Mr. Migis' paycheck data. It is enclosed.

3. See my May 23 letter.
4. With respect to the May 9 letter you sent to us regarding the authenticity of documents, I can advise you that defendant will stipulate that each of the listed documents, with one exception, is authentic, i.e., that they are what they purport to be. The exception is AG-Migis 0002214. We do not have a copy of that and I suspect that we may have made a numbering mistake.
5. We promised you that we would produce, in electronic Microsoft Excel format, the lunch variation reports that have been previously produced to you in hard copy. I understand that Leigh Ann Tift FedExed those to you yesterday and that you are in possession of those.
6. Defendant has reconsidered its objection to your request for one year's worth of time records for hourly employees in the State of Oregon, but have two caveats. Defendant will seek to shift the cost of producing these records to plaintiff if we are

Chey Powelson
June 3, 2008
Page 3

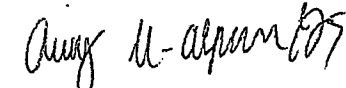
able to establish that they are not relevant, and/or if the class is not certified. Second, we are agreeing to produce the documents pursuant to the terms of a mutually agreeable protective order. With that understanding, defendant will produce electronic records of time worked for each AutoZone employee from November 2006 to November 2007. Please let me know when you have signed the order and have forwarded it to the Court, and we will produce the documents.

7. See my May 23 letter.
8. Defendant has located and is willing to produce reports reflecting weekly summarizations of hours worked by AutoZone employees as requested in Plaintiff's Third Request for Production No. 4. Defendant is willing to produce this information pursuant to the terms of a protective order. Please let me know when you have signed that order and forwarded it to the Court, and we will provide you with the requested documents.
9. As promised, defendant's store managers are making a second attempt at finding termination reports. We have looked at the personnel files of all employees to assure that no termination reports were missed, and the AutoZone's Store Managers have been asked to complete their review by June 5. I will let you know what, if anything, they are able to locate. Given Ms. Tift's experience in reviewing the period boxes for the last two stores in which Mr. Migis worked, I strongly doubt that we will find additional responsive documents. Nonetheless, we have taken the time consuming step of looking a second time.

Please understand that your discovery requests have been extremely cumbersome, that we have spent the last month telling you that we want to work cooperatively on discovery issues. As you can see, we have offered several concessions. Despite that, you continue to file motions to compel and motions for sanctions. At some point, I do hope that we are able to move this case in a direction that is likely to benefit our respective clients. That is what you want, right?

Very truly yours,

LITTLER MENDELSON



Amy R. Alpern

ARA/jrs
Enclosures

EXHIBIT 3

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

MICHAEL MIGIS, individually,)
and on behalf of all others)
similarly situated,)
Plaintiff,)
vs.) Case No. 0711-13531
AUTOZONE INC., A Nevada)
corporation,)
Defendants.)

BE IT REMEMBERED THAT on the 8th day of
April, 2008, the above-entitled matter came on for
hearing before the HONORABLE JEROME LaBARRE, Circuit
Court Judge.

DEBORAH L. COOK, RPR, CSR
COOK COURT REPORTING, INC.
1102 N. Springbrook Road
Suite 136
Newberg, Oregon 97132
(503) 537-0339
deb@cookcourtreporting.com

1 involuntary terminations. Those are the people who have
2 been fired.

3 And the yellow ones, coded A-1, are
4 essentially those who quit with notice. And these are
5 responsive to the Request for Production having to do
6 with the admissions.

7 What we asked for and what you ordered is
8 that in the denial of the admissions, that they produce
9 the documents that they relied on to make the denials.
10 And in this instance if you look at just the very first
11 line item, obviously this is a compilation. Somebody
12 has taken some documents from somewhere and made a
13 spreadsheet. I believe there's underlying documents
14 that go to this compilation.

15 But if you look at the ID that's apparently
16 an employee number, and we go straight across, the last
17 day I would interpret that the employee worked was
18 August 27th, '07. The check cycle was an off-cycle
19 check or not. The N/Y, we assume, is no or yes. So
20 there was a regular check cut.

21 The check date, or the date the check was
22 likely cut would have been September 14th of 2007. The
23 individual had been fired. Our request was admit that
24 you have people that didn't get their check on the next
25 business day after they were fired.

1 would be a lot of production of documents. And it would
2 go well beyond this.

3 Now, your interpretation -- I think it
4 could be argued that your interpretation is way overly
5 narrow on what is called for in that request. However,
6 it is true it may have been poor drafting by the
7 plaintiff's counsel. I want to essentially introduce as
8 a subject notion of all documents that you relied on in
9 support of your denial, that plaintiff may have -- may
10 be hoist by their own petard on that.

11 I guess I don't know if I have to decide
12 that question today. Maybe I can. Right this second I
13 see arguments both ways. But I do know that employment
14 litigation involves production of -- there's been a lot
15 of employment litigation over the last 10, 20 years.
16 And the production by the employer is never so narrow as
17 to be this kind of a spreadsheet.

18 And if the spreadsheet is supplied, then it
19 always -- the relevant underlying documents that are
20 important for both sides in terms of developing the
21 facts in the case, those are always supplied. So it
22 seems like it's going to have a pretty good argument
23 that there's game playing involved here, and that they
24 ought to get sanctions at some point.

25 And I don't -- I am on a special assignment

EXHIBIT 4

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

RICHARD JOARNT AND BERT YAMAOKO,
individually, and on behalf of
all others similarly situated,
Plaintiffs,

vs.

No. 0503-02795

AUTOZONE, INC., a Foreign
Corporation,
Defendant.

_____ /

Deposition of
NICOLE LYNN McCOLLUM
Tuesday, October 25, 2005

Reported by:

SHARON CABELLO, RPR

CSR No. 3080

Job No. 632367

Esquire Deposition Services
949.440.7000

439ec2e4-d805-438b-9774-766d0c5edf6b

Page 86

1 particular on a pay stub.
 2 Q. Okay, thank you.
 3 Who has the authority to terminate an employee
 4 as Autozone?
 5 A. Operations, management -- Operations
 6 management.
 7 Q. Can a Store Manager terminate an employee at
 8 Autozone?
 9 A. Yes.
 10 Q. Do they have a procedure or any kind of
 11 authority that they have to get before they can make
 12 that termination?
 13 A. Yes, standard chain of command, including
 14 myself, that is needed. And if we are going to be
 15 terminating we also get a verbal recommendation from
 16 Autozone Relations.
 17 Q. Okay. If an individual Store Manager has an
 18 employee that for whatever reason believes he wants to
 19 terminate, what steps does he have to take to be able
 20 to do that? Can you just -- today the employee walks
 21 through the door, he has had it, he is 15 minutes late
 22 again, and he decides to terminate them on his own.
 23 A. Could they?
 24 Q. Could the manager do that?
 25 A. Could they do it? It's not a policy, I mean,

Page 87

1 they could -- the manager can terminate someone in the
 2 system, that's their authority to do so. Our process
 3 is they would follow the chain of command, being
 4 discussing the situation with their District Manager;
 5 District Manager would partner with myself, typically I
 6 would partner with Autozone Relations for a verbal
 7 recommendation.
 8 Q. So it kind of goes up the order and then you
 9 get a recommendation from Autozone Relations, and then
 10 what happens?
 11 A. If it's the recommendation we agree with, we
 12 would -- the Store Manager would then execute that
 13 recommendation and termination.
 14 Q. So you get the recommendation yourself and
 15 then pass it on to the District Manager, or does the
 16 Autozone folks pass it directly on to the --
 17 A. It comes to myself, sometimes with the
 18 District Manager attached, sometimes just to myself, it
 19 depends on the person in Autozone Relations.
 20 Q. What about filling a position in a store, does
 21 the manager have authority to go out and hire an
 22 individual?
 23 A. Yes.
 24 Q. Can you do that without authority from other
 25 individuals above you?

Page 88

1 A. Like termination they could. Our process
 2 would be they discuss it with their District Manager
 3 for the pay reason.
 4 Q. Is there a -- if you know, is there a set
 5 number of employees that a particular store can't have
 6 on its payroll?
 7 A. It doesn't work that way.
 8 Q. Okay. How does --
 9 A. There is no minimum/maximum for that reason.
 10 When -- staffing in stores is dependent on volume.
 11 That would be more a District Manager function than
 12 myself. Or the schedule versus -- our practice is a
 13 70/30 mix, 70 percent full-time, 30 percent part-time.
 14 It's a guide we use in the store for coverage. It's
 15 flexible. You could have an abundance of part-time
 16 people with very limited schedules, i.e. only working
 17 two nights or only working weekends and, therefore,
 18 inflate the number of employees versus another store of
 19 similar volume that is a strict 70/30 mix.
 20 Q. Okay. And the actual sales volume of the
 21 store dictates the number of employees that would
 22 typically be allocated for a particular store?
 23 MS. TIFT: Object to the form of the question,
 24 misstates and mischaracterizes her testimony.
 25 THE WITNESS: Nothing dictates the number of

Page 89

1 employees, it dictates the available hours allocated
 2 based on store volume. You hire accordingly based on
 3 your geographic area, your market.
 4 Q. MR. BAILEY: Okay. So when I say dictates the
 5 number of employees, the contradiction that I stated
 6 there is that it's really the number of hours that the
 7 store can utilize employees in; is that correct?
 8 A. The number of hours is a guide based on
 9 expected volume.
 10 Q. Okay. Can a Store Manager on his own decide
 11 that he needs an additional 30 hours a week?
 12 MS. TIFT: Object to the form of the question,
 13 calls for speculation.
 14 THE WITNESS: Could he decide that he needs
 15 that? Or could he use that? They are two very
 16 different questions.
 17 He can use anything he wants, they have the
 18 power in the store to do so.
 19 Q. MR. BAILEY: If a Store Manager is allocated
 20 through whatever function 200 hours, and believes that
 21 he needs 250, it's up to him -- he has authority to go
 22 ahead and hire -- put people on staff to use up the 250
 23 hours?
 24 MS. TIFT: Object to the form of the question,
 25 calls for speculation.

23 (Pages 86 to 89)

Page 94

1 A. It depends. It would depend on where it came
 2 from. Some reports run by our analysts, like the HR
 3 report I mentioned earlier, has numerous tabs. That
 4 comes in an email.
 5 Sometime she will call it one thing, and
 6 sometime another. It's a query that she runs. Other
 7 information that I may get along with multiple other
 8 Autozone employees may have an Autozone header on it.
 9 Q. Okay. So with regard to this Exhibit 9, if
 10 this is an Autozone report, there is no way to tell
 11 from the document itself; is that correct?
 12 A. I have not seen it before, so I don't know,
 13 not by just looking at it, no.
 14 Q. And there is nothing on here that you can look
 15 at that would identify it as an Autozone report?
 16 A. Not without taking a guess, no.
 17 Q. And the same would be the case of Exhibit 8;
 18 is that correct?
 19 A. Correct.
 20 Q. Looking at Exhibit 9, it identifies -- if you
 21 just take the first person, it looks like Alejandro
 22 Agala, A-l-e-j-a-n-d-r-o A-g-a-l-a. It shows
 23 Department ID 2227, and then it has Sales, Part-Time.
 24 And then it says Action TER, I take that to mean
 25 terminated, and reason A4, And then an effective date

Page 95

1 8/6/2005.
 2 Do you understand from what is on here what
 3 that is intended to say?
 4 A. I could speculate.
 5 Q. Do you know what reason A4 means?
 6 A. No.
 7 MS. TIFT: Object to the form of the question.
 8 If you want to provide her the legend that was also
 9 supplied with this, she could probably read it for you,
 10 Mr. Bailey, this is misleading and unfair.
 11 MR. BAILEY: Thank you.
 12 Q. You don't know what A4 is?
 13 A. No.
 14 Q. Do you have -- is there a document in Human
 15 Resources from which you could draw the information of
 16 why a person is terminated?
 17 A. Would you clarify that?
 18 Q. Sure. When a person is terminated is there a
 19 document that is filled out and stored in Human
 20 Resources that identifies why a person is terminated?
 21 A. All separations are handled at the store level
 22 or Operations level of appropriate nature. I do not
 23 separate anyone that doesn't work for me, that will be
 24 entered into the store SMS system and would be along
 25 with other data uploaded to the office in Memphis.

Page 96

1 So I would not code it. If you are asking me
 2 if I could find out what this meant, I could call and
 3 ask someone.
 4 Q. Do you have people that work for you?
 5 A. Yes.
 6 Q. If you terminate someone that works for you,
 7 do you have a termination form that you fill out?
 8 A. Yes. And it is not like the store's.
 9 Q. Does the store have a termination form?
 10 A. It's an internal form, it's in the computer.
 11 They complete it electronically in the computer.
 12 Q. So the form itself exists, it's in the
 13 computer?
 14 A. Correct.
 15 Q. If you want to print that form out it would be
 16 in the computer?
 17 A. I don't know if it's printable in the way that
 18 you are -- we do not have a print screen function. So
 19 if you are looking to just print out a blank page of
 20 what you see on the screen, I don't know if that's
 21 possible.
 22 Q. If I --
 23 A. Could you look at it? Yes.
 24 Q. Could I print out a copy of what I see on the
 25 screen?

Page 97

1 MS. TIFT: Object to the form of the question,
 2 asked and answered.
 3 THE WITNESS: If it's not completed, I don't
 4 know that you can.
 5 Q. MR. BAILEY: Let's say that we completed the
 6 form.
 7 A. Yes, you can print that.
 8 Q. Alejandro Agala has now been terminated and
 9 the form was filled out. It was done on August 6,
 10 2005. Can I get a copy of that?
 11 A. Yes. At that time, I believe.
 12 Q. Do you know if that is saved into the
 13 computer?
 14 A. I don't know.
 15 Q. Well, do people have Human Resources files,
 16 personnel files?
 17 A. Yes.
 18 Q. When someone is hired you put their hire
 19 information in the file?
 20 A. Some of it, yes.
 21 Q. For example, you put in the file an
 22 application?
 23 A. Yes.
 24 Q. And you put in the information, their W-4, and
 25 that kind of stuff, W-2 Forms?

25 (Pages 94 to 97)

Esquire Deposition Services
 949.440.7000

439ec2e4-d805-438b-9774-766d0c5edf6b

EXHIBIT 5

Michael Migis

May 20, 2008

Page 1

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

MICHAEL MIGIS, individually,
and on behalf of all other
persons similarly situated,
Plaintiff,

vs. NO. 0711-13531

AUTOZONE, INC., a Nevada Corporation,
Defendant.

VIDEOTAPED
DEPOSITION OF MICHAEL MIGIS

Taken on Behalf of the Defendant
Tuesday, May 20, 2008

Beovich Walter & Friend

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Michael Migis

May 20, 2008

Page 106

1 sorry. Can -- can I retract that?

2 Q Sure.

3 A The telephone conversation did happen. But it
4 was my first initial conversation with 401K,
5 and it was before I had actually quit AutoZone.

6 Q Okay.

7 A And what I had asked them is, I asked them if I
8 could take out a loan against my 401K. And I
9 had an existing thousand-dollar loan from 2002
10 that I used to get my wife and I up to the
11 Portland area. And because of that outstanding
12 loan, they could not give me a second loan on
13 my 401K.

14 Q Okay. So as best you know, did that happen on
15 the 6th, Monday?

16 A Yes.

17 Q Okay. And then what was the next thing that
18 happened?

19 A I called corporate.

20 Q Okay.

21 A And I asked them -- basically, I had the same
22 conversation with AutoZone corporate. And
23 whoever I talked to told me that the only way
24 that I could access my 401K money was if either
25 I retire or I quit the company. I hung up the

Beovich Walter & Friend

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Michael Migis

May 20, 2008

Page 110

1 Q Okay.

2 A You're talking on-the-clock, get paid
3 on-the-clock.

4 Q Okay. So you're pretty confident that you were
5 not paid for any days after February 4.

6 A February 4th was the last day that I worked for
7 AutoZone.

8 Q Okay.

9 A February 6th was the day that I quit.

10 Q Okay. And you quit by informing your peer,
11 Scott Klein?

12 A He's my equal.

13 Q Right.

14 A Yes. I made an attempt to call Mike Italiano.
15 That was my first attempt.

16 Q Typically, when would you have received the --
17 is there usually a three-week lag between when
18 you work and when you get paid?

19 A Not three weeks.

20 Q Okay.

21 A There's a one-day -- you know, if I -- if I
22 were just to start the company today, I would
23 have to wait one week. They hold one week's
24 pay back. And -- but if payday was next week,
25 then I'd work this week, work the second week,

Michael Migis

May 20, 2008

Page 113

1 A Exactly.

2 Q And you also got the cash out of your 401K?

3 A No, my 401K was sitting in the bank for a week
4 before I got my last check from AutoZone.

5 Q Okay. Do you recall about how much it was that
6 you received from your 401K?

7 A Well, after 20 percent federal taken out of it,
8 it was approximately \$9,000 -- \$9,000.

9 Q Okay. And then did you get any other checks
10 from AutoZone besides these three, the last
11 paycheck, the stuff from the sale -- of the
12 stock purchase plan and the 401K proceeds?

13 A The 401K proceeds did not come from AutoZone.

14 Q Okay. Right. But beyond those three checks,
15 did you get any other payment from AutoZone or
16 the --

17 A I -- I received one check for the sale of my
18 stocks.

19 Q Right.

20 A And then I -- I want to say three checks, as
21 far as relative to stock.

22 Q Okay. Three checks?

23 A And that -- and that includes balanced. There
24 wasn't enough moneys to buy stocks. This is
25 what was left over, and that was the final

Michael Migis

May 20, 2008

Page 116

1 And I said, I need you to terminate me out of
2 the system so that corporate can terminate me
3 out of the system so that 401K can be notified
4 I've been terminated so they can release my
5 monies to me.

6 Q Okay. And do you have an idea in your mind
7 about when that conversation happened?

8 A I want to say Tuesday following the Monday that
9 I -- that I left the company. I think Mike
10 Italiano was off that Monday, I -- I think.

11 Q And then the second time you talked to him?

12 A Would have been more towards Friday.

13 Q Okay.

14 A But that was not because I did not try to get
15 ahold of him before that.

16 Q Right.

17 A I tried calling the store, he was not there.
18 It was his day off.

19 Q Okay. And the second --

20 A But --

21 Q Did you ask him if the check was at the store?

22 A I hadn't even been terminated yet.

23 Q Okay.

24 A So there's no way that -- that the check would
25 be at the store at that point in time.

Beovich Walter & Friend

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Michael Migis

May 20, 2008

Page 169

1 that I won't be terminated until sometime
2 later; correct? My intentions --

3 A If --

4 Q -- might not be clear.

5 A If one were to do that, then you would be
6 correct.

7 Q Okay. Did you ever know of any employees who
8 just stopped coming in and then came back and
9 said: Look, I'm really sorry. I just went off
10 with my girlfriend. Or I did whatever, and I'm
11 sorry, and I'd like to be reinstated?

12 A Not -- not the situation that -- that you
13 described, no.

14 Q Anything like that?

15 A I personally have walked off the job from
16 AutoZone, took three days off and came back and
17 assumed the same position with the company.

18 Q Okay.

19 THE VIDEOGRAPHER: Eight minutes.

20 MS. TIFT: Okay.

21 Q BY MS. TIFT: Would you agree with me that hourly
22 employees are personally responsible -- your
23 job -- to clock in correctly at the register?

24 A Yes.

25 Q And if you don't clock in correctly at the

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EXHIBIT 6

AutoZoner Termination Report

*** AutoZone 2236 ***

02/08/2006

09:43:55

Page 1

AutoZoner Emp ID: 10090549

AutoZoner Name: MIGIS, MICHAEL

AutoZoner Address:

AutoZoner City:

AutoZoner State: OR

AutoZoner Zip: 97220

AutoZoner Phone: (503)

Termination Reason: Quit With Notice

Last Day Worked: 02/10/2006

Last Day Paid: 02/10/2006

Would You Rehire?: No

*Comments

MIKE FAILED TO SHOW FOR WORK THE STORE
WAS NOT OPENED ON TIME

WRONG KEY PRESSED SHOULD READ QUIT
WITHOUT NOTICE

Manager Signature:



Completed By: ITALIANO, MICHAEL

Job Title: Manager

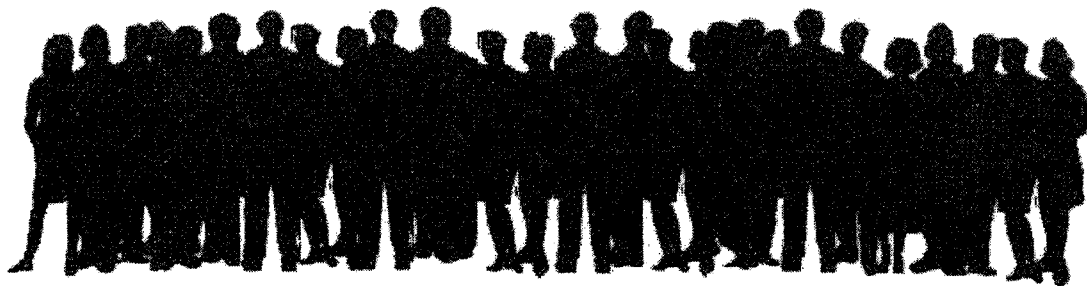
Date: 02/08/2006

REDACTED

AZ/MIGIS 0001347

EXHIBIT 7

Being a Manager



Types of disciplinary action (continued)

Type of Action	Details
Termination	<p>AutoZone is an at will employer. Termination may be a result of unsatisfactory or inefficient job performance or unacceptable personal conduct.</p> <ul style="list-style-type: none"> • Before considering termination of an AutoZoner, <ul style="list-style-type: none"> • the Store Manager should discuss the problem with the DM, RM or RHRM, and • the RHRM should discuss the problem with DHRM/ AutoZoner Relations. • Once an agreement is reached on the need to terminate an AutoZoner, a dismissal conference must be scheduled with the following people duly notified and in attendance, <ul style="list-style-type: none"> • the Manager or other person chosen by AutoZone management to conduct the conference • the AutoZoner, and • if the person conducting the conference chooses, security may also be present. <p>IMPORTANT: No attorney shall represent either side at the conference. The conference attendees will review the reasons for termination and documentation.</p>

Continued On Next Page

EXHIBIT 8

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

MICHAEL MIGIS, individually,)
and on behalf of all others)
similarly situated,)
Plaintiff,)
vs.) Case No. 0711-13531
AUTOZONE INC., A Nevada)
corporation,,)
Defendants.)

DEPOSITION OF CARLOS JON

TAKEN IN BEHALF OF PLAINTIFF

Portland, Oregon

May 15, 2008

DEBORAH L. COOK, RPR, CSR
COOK COURT REPORTING, INC.
1102 N. Springbrook Road
Suite 136
Newberg, Oregon 97132
(503) 537-0339
deb@cookcourtreporting.com

1 Q Under Last Date, what does that identify?

2 A That would be the last date worked.

3 Q That's the last day that an employee
4 performed labor?

5 A That's the last date that the employee had
6 any time in the time clock.

7 Q So this would be the last day an employee
8 worked?

9 A Correct.

10 Q Where there was time recorded for their
11 work?

12 A Right. If they worked the time recorded
13 for that date, that was the date.

14 Q And then on the other side it says Off
15 Cycle. What does that mean?

16 A Off Cycle meaning that we have a period for
17 pay cycles. "Yes" means it was paid during the pay
18 cycle; "no" means it was paid in between pay cycles.

19 Q Let me back up and see if I can understand
20 that. If it says Off Cycle, No, that means they
21 received their check on the next regular payday, or on a
22 regular payday?

23 A That is correct.

24 Q And if it says Off Cycle, Y, meaning yes,
25 it means the check was prepared, but not at a regular

1 A For net, right.

2 Q When you look at one of these, would there
3 have been a gross pay? If you looked at a screen print
4 when you said this might have been made up of screen
5 prints, would there have been a Gross Pay column?

6 A I don't recall.

7 Q And then over, the next thing is Reason
8 B-3? Do you know what B-3 means?

9 A There is a legend towards the back, and we
10 go to -- B-3 would be page 1218, and B-3 would be almost
11 past halfway. B-3, violation of company policy.

12 Q And over there it says VOL or INVOL in a
13 column across from that where you are looking at B-3 on
14 page 1218?

15 A Yes.

16 Q And it says Involuntary, does that mean
17 someone was fired?

18 A Yes.

19 Q Can you tell me from this particular
20 document, can you tell me what day the employee -- and I
21 am looking at employee 1004509, the first employee
22 listed on this document, can you tell me what day that
23 employee was fired?

24 A No.

25 Q The next one down, which is employee ID

1 A If I would tell the manager to put quit
2 with notice?

3 Q Yes.

4 A Let me think about it. I have never had
5 that question asked. I couldn't tell what the manager
6 would do, but that's what I would tell the manager, quit
7 with notice.

8 Q And from your background in working in
9 Oregon, do you know whether or not managers received any
10 training on when they are to make sure people get paid
11 if someone quits with notice or without notice?

12 A Yes, there's a training manual for that,
13 terms, and they go through the training and they deal
14 with how to process if somebody, quote, unquote -- for
15 example, if somebody gets terminated.

16 And the HR manager will approve the
17 termination, and then will call the Payroll Department.
18 And they will process -- the Payroll Department will cut
19 a check within the guidelines of whatever state we're
20 operating.

21 Q Okay. Were you -- did you have any review
22 of the Request for Admissions that were made to Auto
23 Zone having to do with the production of this particular
24 document? And I am talking about Exhibit No. 3.

25 MS. ALPERN: Are you talking about at the

EXHIBIT 9

AutoZoner Termination Report

*** AutoZone 2203 ***

01/29/2007


12:45:31

Page 1

AutoZoner Emp ID: 10346896
AutoZoner Name: CADENA, BLADIMIR
AutoZoner Address:
AutoZoner City:
AutoZoner State: OR
AutoZoner Zip: 97132
AutoZoner Phone: (503)
Termination Reason: Abandoned Job *
Last Day Worked: 01/03/2007
Last Day Paid: 01/03/2007
Would You Rehire?: No

*Comments

*NO CALL NO SHOW
CALLED LEFT MESSAGE 5 DAYS IN A ROW
NO REPLY
DIDNT RETURN any calls.*

Manager Signature: 

Completed By: NARAYAN, RAJ

Job Title: Manager

Date: 01/29/2007

REDACTED

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

MICHAEL MIGIS, individually, and on
behalf of all other persons similarly
situated,,

Plaintiff,

vs.

AUTOZONE INC., a Nevada
Corporation,,

Defendant.

No. 0711-13531

**DEFENDANT'S OPPOSITION TO
PLAINTIFF'S MOTION TO ENFORCE
COURT ORDER AND MEMORANDUM IN
SUPPORT THEREOF**

DATE: JULY 11, 2008

I. INTRODUCTION

Plaintiff's motion is an unjustified effort to turn a discovery dispute--which has previously been adjudicated by this Court and which AutoZone has attempted to respond to to Plaintiff's satisfaction--into a larger, more protracted dispute for procedural advantage. In sum, Plaintiff asks this court to (1) rule now that AutoZone's summary report of information relating to terminated employees is admissible at trial (with no showing of relevance to issues that may or may not be tried before the court or a jury), or (2) rule that the summary table cannot be supplemented or explained by other evidence (for example, by testimony of the store managers who recorded the terminations or the employees who terminated their employment or by other evidence that AutoZone supplied in discovery), or (3) order production of documents that AutoZone cannot locate, despite diligent efforts to do so, or (4) strike AutoZone's affirmative defenses, or (5) order depositions unrelated to the subject of the Court's first discovery orders. Further, Plaintiff's request for additional sanctions is unwarranted and duplicative of relief that has previously been requested from the Court.

1 **II. RELEVANT FACTS**

2 **A. Plaintiff's Requests for Admission and First Requests for Production.**

3 It is true, as Plaintiff points out in this Motion, that Plaintiff's Requests for Admission (the
4 "RFA'S") 1-3 ask that Defendant admit that it failed to pay "at least one" employee outside the time
5 frames set forth in ORS 652.140. AutoZone's Response to these Requests, in relevant part was:

6 ...Without waiving its objections, Defendant has not knowingly failed to pay any employee
7 final wages on time, is unaware of any instance where it has done so, and therefore denies
8 this Request on that basis. Defendant further asserts that its policies and procedures intend
that employees be paid final wages within the time frames set out in the applicable Oregon
statutes.

9 Plaintiff's Requests for Production (the "RFP'S"), which follow the RFA's, seek: "all documents
10 and electronically stored information for [the employees identified in the preceding RFA] within the
11 referenced time period which Defendant relies upon to support its denial." In response to Plaintiff's
12 demands, and prior motions to compel, AutoZone has supplemented its responses to these RFP's
13 four times. Specifically, AutoZone's Fourth Supplemental Response to RFP 2 reflects the
14 following:

15 **FIRST SUPPLEMENTAL RESPONSE:** Defendant incorporates by reference its General
16 Objections...., [objects] to this request to the extent it unduly burdensome and overbroad, is not
17 limited to employees who worked in the State of Oregon, seeks information beyond the proper scope
18 of pre-certification discovery, and seeks information about individuals other than Plaintiff Migis.
19 Defendant also objects to the request for electronically stored information as overbroad and unduly
20 burdensome given that any need for such information is outweighed by the burden to Defendant of
21 searching its electronic records.

22 **SECOND SUPPLEMENTAL RESPONSE:** With respect to Plaintiff Migis, Defendant
23 maintains that Plaintiff has all relevant documents; to wit, Plaintiff's final paycheck and Plaintiff's
24 personnel file reflecting the date his employment ended with AutoZone.

25 **THIRD SUPPLEMENTAL RESPONSE:** Defendant incorporates by reference its General
26 Objections as though fully set forth herein and its specific answer and objections to this RFP as set

1 forth above. Without waiving such objections, *see*, documents previously produced to Plaintiff (i.e.,
 2 those labeled AZ/Migis 000001-0001655), documents attached hereto, labeled AZ/Migis 0001656-
 3 0001863, and electronic information provided on disk, labeled AZ/Migis 3rd Supplemental.

4 **FOURTH SUPPLEMENTAL RESPONSE:** Defendant incorporates by reference its
 5 General Objections as though fully set forth herein and its specific answer and objections to this RFP
 6 as set forth above. Without waiving such objections, *see*, AZ/Migis 001864-0001881.
 7 *See*, Exhibit 1, Declaration of Tift. AutoZone's answers to each RFP seeking documents to support
 8 the answers to the RFA's are similar.

9 In addition to the summary chart (Plaintiff's only focal point for this Motion), the documents
 10 produced in response to these Requests for Production ("RFP's") were termination reports for
 11 employees who terminated in the period November 2006 to November 2007, a screen print of the
 12 paycheck data for each person who was terminated during this period of time, and AutoZone's store
 13 handbook (which sets out the general rules for payment of wages). Additionally, AutoZone
 14 produced a memo from AutoZone's Director of Payroll (who is responsible for all payroll functions)
 15 reminding field officers of "our policy to call in all Oregon terminations on a timely basis so that we
 16 may issue the appropriate manual check for their final pay," and training materials for managers,
 17 which provide, in relevant part, that dismissal of an employee cannot take place on the spot. Decl.
 18 of Tift; *see*, also Exhibit 2 to Decl. of Tift.

19 Despite all of this information, Plaintiff persists with a theory that the only document that has
 20 been produced by Ironwood is the summary report. Plaintiff's position is inexplicable, given that
 21 Plaintiff's counsel argued vociferously to obtain the "underlying" documents, and in fact, every
 22 document that supported the summary chart. As an example, Plaintiff's counsel quotes part of the
 23 exchange between the Court and Mr. Olsen on March 8, 2008,¹ but omits the fact that neither Mr.
 24
 25

26 ¹ Exhibit C to Decl. of Powellson.

1 Bailey nor the Court was satisfied with AutoZone's production of only the summary report. Mr.
2 Bailey stated:

3 What we asked for and what you ordered is that in the denial of the admissions, that they
4 produce the documents that they relied on to make the denials. And in this instance if you
5 look at just the very first line item, obviously this is a compilation. Somebody has taken
6 some documents from somewhere and made a spreadsheet. I believe there's underlying
7 documents that go to this compilation.

8 Excerpt of March 8 transcript ("March 8, Tr."), attached as Ex. 3 to Decl. of Tift, at 7:7-14. The
9 Court adopted Mr. Bailey's position, and directed that AutoZone produce all termination reports and
10 "underlying documents." The Court expressly stated:

11 Now, your interpretation -- I think it could be argued that your interpretation is way overly
12 narrow on what is called for in that request. However, it is true it may have been poor
13 drafting by the plaintiff's counsel. I want to essentially introduce as a subject notion of all
14 documents that you relied on in support of your denial, that plaintiff may have -- may be hoist
15 by their own petard on that.

16 March 8 Tr. at 13:3-10 (also attached as Exhibit 3).

17 Having insisted upon, and now received underlying documents, policies, memos and (as
18 described below) testimony from a corporate witness, Plaintiff's counsel wishes to pretend that all of
19 this discovery has not changed hands. Plaintiff's request for a court order "preclud[ing] Defendant
20 from introducing into evidence any matters refuting information contained in the summary report"
21 *see*, Suppl. Briefing at 2:21-22,² flies in the face of the demands made before this Court and the
22 hours spent by AutoZone responding to discovery motions and supplementing discovery requests.

23 **B. AutoZone's Production of Termination Reports.**

24 When the Court denied AutoZone's request for an extension of time on April 22, AutoZone
25 chose to make an extraordinary effort to find all termination reports, and did so principally on April
26 23, 2008, the date ordered by the Court, with the remainder of all documents that could be found on
27 April 24. Plaintiff is correct that many of the reports cannot be located, but that is not the result of
28 negligence or a failure to search. AutoZone's store managers, the Regional HR manager, and

² Plaintiff's "First Request for Relief."

1 AutoZone's counsel in this case have searched period boxes in the stores and all personnel files for
 2 each terminated employee. Decl. of Tift. The missing termination reports cannot be located—either
 3 because they were not printed at the time³ or because they have been misplaced.

4 **C. Plaintiff Requested Documents.**

5 Plaintiff's Requests are directed to documents, and neither the summary report nor the
 6 termination reports tell the whole story relating to employee terminations. It is possible, and
 7 Plaintiff's counsel is well aware that it is likely, that the circumstances surrounding a person's
 8 decision to quit, AutoZone's process for terminating employees, and/or recollections of the persons
 9 involved lend an explanation to the data found in the summary report, but are not necessarily
 10 recorded in a document.

11 Mr. Migis' testimony, on this point, is illustrative. The summary report, which Plaintiff
 12 wishes to turn into the universe of information, tells the date that Mr. Migis last worked, but not the
 13 day that Mr. Migis' manager determined he quit. That is, Mr. Migis' last day of work, according to
 14 him, was February 4, 2006. At some point after that date, Mr. Migis decided to quit his job at
 15 AutoZone because he wanted to access his 401(k) funds. The date that Mr. Migis "quit" or
 16 AutoZone knew that he "quit" is much more difficult to ascertain than the day he last worked and
 17 there are no "documents" that are definitive. Specifically, Mr. Migis testified at his deposition that
 18 on February 6, 2006, before he attempted to "quit," he had a conversation with "corporate" to ask
 19 how he could get his 401(k) funds.⁴ He was told that because he already had a loan against the
 20 account he had to quit or retire. Migis Tr. at 106:3-25.⁵ Mr. Migis said he did not want to quit, he
 21 just wanted the money in his 401(k) account. Mr. Migis did not initially contact his Store Manager
 22 to tell him he was quitting, he called his peer, Scott Klein. Later in the week, Mr. Migis called his
 23

24 ³ It is counsel's understanding that if the form isn't printed from the screen at the Store where the data is inputted, it
 25 cannot later be printed. See, Ex 4 to Decl. of Tift, McCollum Tr. at 96:12-97:11.

26 ⁴ Mr. Migis said he told AutoZone he intended to quit on February 6, 2006. There is good reason to doubt Mr. Migis'
 recollection of this date.

⁵ Excerpts of Mr. Migis' Deposition Transcript are attached as Exhibit 5 to the Decl. of Tift.

1 Store Manager to tell him he wanted to quit.⁶ Migis Tr. at 110:9-15; 113:3-12. After he talked to his
 2 Store Manager, Mr. Migis' employment was terminated and a termination report generated. *See*,
 3 Exhibit 6, Declaration of Tift. That report shows that Mr. Migis was considered to be on
 4 AutoZone's payroll until February 10, 2006. Mr. Migis' last check was sent to the store, but he
 5 didn't call or pick up the check until the last week of February. Migis Tr. at 116:21-125. Of course,
 6 none of this testimony is contained in a document, but it is, nonetheless, relevant to both Mr. Migis'
 7 late pay claims and relevant to the issue of whether his experience in leaving AutoZone is a common
 8 experience sufficient to qualify him as a class representative. Plaintiff's motion, essentially, asks
 9 that the Court preclude any testimony relating to the circumstances that surrounded an employee's
 10 termination or the payment of their final wages.

11 **D. Limitations of the Summary Report.**

12 AutoZone's counsel has attempted to explain the limitations of the summary report to
 13 Plaintiff's counsel a number of times. Plaintiff's deposition of AutoZone's Divisional HR Manager,
 14 Carlos Jon, also conveyed that information. That is, while the information contained in the summary
 15 report is accurate, it does not tell the complete story of how an employee was terminated, when an
 16 employee was told his or her employment with AutoZone was to end, or when AutoZone had notice
 17 that the employee intended to quit.

18 As to terminations, for example, AutoZone's training manual makes it clear that a manager
 19 must involve AutoZone Human Resources and schedule a dismissal conference. *See*, Exhibit 7,
 20 Decl. of Tift. In depositions, Mr. Jon explained that an HR manager must approve terminations and
 21 request a check from payroll prior to the dismissal conference. *See*, Exhibit 8, Excerpt of Deposition
 22 of Carlos Jon, at 103:8-20, attached to the Declaration of Tift.⁷ In practical terms, this means that an
 23 employee might have a last day worked reflected on the termination report that was days earlier than
 24

25 ⁶ Even then, it is important to note that Migis' testimony is that he didn't want to quit, he just wanted his 401(k) funds,
 and his message was mixed, to say the least.

26 ⁷ *See*, also, Excerpt of Transcript of Nicole McCollum in the Joarnt matter, attached as Exhibit 4 to Decl. of Tift, at pp
 86:10-87:19.

1 his or her termination date—because he or she was on leave or off the work schedule pending an
 2 investigation, a disciplinary decision and/or the disciplinary conference. *See*, Jon Tr. at 90:1-13;
 3 92:16-24. That information would not be included in a document, but it would be gleaned from a
 4 discussion from the store manager.

5 Likewise, AutoZone does not always know when an employee intends to quit. As can be
 6 seen from some of the termination reports provided to Plaintiff's counsel, sometimes an employee
 7 doesn't give notice that he intends to quit, and AutoZone does not automatically terminate an
 8 employee who doesn't show up for a shift. Mr. Migis, in fact, testified that he walked off the job
 9 once but then decided to return three days later. Migis Tr. at 169:15-17. Mr. Migis did not write
 10 anything expressing an intention to quit and AutoZone did not terminate his employment—thus
 11 illustrating quite clearly one of the problems with ascertaining when an employee "quits."

12 The summary report can be used to show the last day an employee worked at an AutoZone
 13 store, but it doesn't necessarily show the date that a Store Manager finally came to the conclusion
 14 that the employee quit. That information might be included on a termination report, *see*, e.g.,
 15 Exhibit 9 to Declaration of Tift, or it might not be documented at all. Regardless, the last day
 16 worked as shown on the summary report is not the equivalent of the last day of employment in this
 17 situation, or in many others. Recognition of these facts does not mean that AutoZone "disowns" the
 18 summary report.

19 **III. ARGUMENT AND AUTHORITY**

20 AutoZone did not fail or refuse to obey this Court's rulings on discovery matters. Prior to the
 21 date that Plaintiff's counsel filed this motion, termination reports and paycheck information which
 22 Plaintiff's counsel requested have been produced. AutoZone is unaware of any other kind of
 23 document that constitutes an "underlying" document related to the summary report, and notes that
 24 Plaintiff has not identified anything else in this motion or in any correspondence that preceded it.⁸

25
 26 ⁸ *See*, e.g., Exhibit 2 to Declaration of Tift, which is the second letter that followed a lengthy discovery conference which took place in Plaintiff's counsel's office.

1 In regard to this motion, it is important to clarify that AutoZone has produced the pay
 2 information for every terminated employee for the period requested in its discovery responses.
 3 Plaintiff's implication that AutoZone has not, or the suggestion that AutoZone does not maintain
 4 required records, citing OAR §839-020-0080(1), is simply wrong. ORS 653.045 provides, in
 5 relevant part:

6 **653.045 Records to be kept by employers; itemization of deductions from wages.** (1) Every
 7 employer required by ORS 653.025... to pay a minimum wage to any of the employer's
 8 employees shall make and keep available... for not less than two years, a record or records
 containing:

9 (a) The name, address and occupation of each of the employer's employees.

10 (b) The actual hours worked each week and each pay period by each employee.

11 ...

12 OAR §839-020-0080(1) adds nothing to the contrary, and certainly does not mandate that Oregon
 13 employers keep perfect copies of termination reports. Contrary to Plaintiff's implication,
 14 termination reports are not pay records. AutoZone's pay records are maintained in accordance with
 15 the law, and Plaintiffs have received paycheck data for all terminated employees.

16 As to the termination reports, however, AutoZone cannot produce documents that cannot be
 17 located or do not exist. "A court has discretion in imposing sanctions for discovery violations, *see*
 18 *Stronach v. Ellingsen*, 108 Or. App. 37, 40, 814 P.2d 175, *rev den* 312 Or. 151 (1991), but it cannot
 19 compel a person to produce documents that the person does not have." *Nelson and Nelson*, 117 Or.
 20 App. 157, 161, 843 P.2d 507 (1992). In sum, even Plaintiff's counsel concedes there is no evidence
 21 to show that anything relevant to these discovery requests has been withheld by AutoZone:

22 ("AutoZone **may** have failed to produce all late pay claim-related discovery..."). *See*, Supplemental
 23 Briefing, pg. 10:16-17 (emphasis added). Absent a good faith belief that AutoZone withheld
 24 information or failed to produce information ordered by the Court, Plaintiff's motion is baseless and
 25 brought for an improper purpose.
 26

A. Plaintiff's have not Shown that Sanctions are Warranted in Regard to their Requests for Admission.

Plaintiff's counsel contends that the extraordinary sanctions sought in this motion are warranted, in large part, because AutoZone failed to admit the contentions set out in RFA's 1-3. However, AutoZone's answers to Plaintiff's RFA's are fair. It is clear from the documents produced by AutoZone that its policies call for timely payment of final wages. To the extent that the policies are not met in every respect, it is because mistakes are made, or an employee's intentions are unclear, or there are good faith misunderstandings.

Contrary to Plaintiff's assertions, Oregon law does not penalize employers for mistakes in paying employees. Instead, an employer is subject to penalties only if "an employer ...fails to pay wages owed at termination [where the employer is] 'fully aware of [its] obligation to do so' but nonetheless consciously and voluntarily decides not fulfill that obligation." *Wilson v. Smurfit Newsprint Corp.*, 197 Or. App. 648, 107 P.3d 61 (2005). AutoZone's answers to the RFA's reflect a reasonable interpretation of its duty to pay final wages under Oregon law. The answer does not warrant the sanctions Plaintiff requests.

Moreover, in accordance with ORCP 46C, sanctions are permitted for a failure to admit only where:

[A] a party fails to admit...the truth of any matter, ... and [] the party requesting the admissions thereafter proves... the truth of the matter, the party requesting the admissions may apply to the court for an order requiring the other party to pay the party requesting the admissions the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 45 B or C, or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that such party might prevail on the matter, or (4) there was other good reason for the failure to admit. (emphasis added)

Plaintiff has yet to prove that AutoZone denied the truth of a statement which was true, and even in the unlikely event that Plaintiff is able to do so in regard to these RFA's (which AutoZone contends will not happen), it is inappropriate for Plaintiff to attempt to invoke this provision because Plaintiff's admission concerning AutoZone's "fail[ure] to pay all wages earned and unpaid...to at least one [employee]" is irrelevant to the contentions set forth in the complaint. That is, Plaintiff

1 contends that AutoZone engages in a company wide practice of failing to pay final wages on time.
 2 Even if it were true that one person was paid late, that one exception is completely irrelevant to class
 3 treatment, as class treatment hinges on proof of a uniform practice or policy—not a single exception.
 4 Commonality, for purposes of a class action, exists only when the defendant has engaged in
 5 “standardized conduct” toward the members of the proposed class, thus establishing that all class
 6 members are “similarly situated.” *Caulton v. Merchants’ Credit Guide Co.*, 2007 WL 625457 (N.D.
 7 Ill. 2007); see, also, *Joachim v. Crater Lake Lodge*, 48 Or. App. 379, 392, 617 P.2d 632, rev den 290
 8 Or. 211 (1980).

9 **B. Plaintiff has not shown a Basis to Strike AutoZone’s Affirmative Defenses.**

10 Plaintiff also suggests that it is appropriate, at this juncture, to strike AutoZone’s affirmative
 11 defenses related to good faith and bona fide dispute. A motion to strike pleadings is subject to the
 12 same standard as a motion for directed verdict. The Court must give a defendant every inference in
 13 his favor that may reasonably be drawn from the evidence. *Lemons v. Holland*, 205 Or. 163, 167,
 14 284 P.2d 1041 (1955); *Manchunze v. Chemeketa Community College*, 106 Or. App. 707, 712, 810
 15 P.2d 406, rev den 312 Or. 16 (1991) (In reviewing a motion to dismiss under ORCP 21A(8), the
 16 Court must assume the truth of all well-pleaded allegations and any inferences favorable to the
 17 pleader that could be drawn.) Nothing in Plaintiff’s motion is sufficient as a basis to strike these
 18 defenses, and, in fact, it is not even clear how this remedy relates to the wrong that Plaintiff alleges
 19 in this Motion.

20 In any event, and as noted above, Oregon law is contrary to Plaintiff’s assertions. In *Wilson*
 21 *v. Smurfit Newsprint Corp.*, 197 Or. App. 648, the Court explained that it was inappropriate to
 22 assume that any kind of mistake could lead to liability under Oregon’s wage and hour provisions.
 23 The Court said:

24 The cases, then, all apply the definition first stated in [*State ex rel Nilsen v. Johnston*, 233 Or.
 25 103, 108, 377 P.2d 331 (1962)]: An employer acts willfully if it knows what it is doing,
 26 intends to do what it is doing, and is a free agent. However, *Johnston* itself explains that an
 employer that makes an “unintentional miscalculation” does not act willfully, 233 Or at 108,
 and both *Lee*, 251 Or at 293-94, and *Hekker*, 265 Or at 561, hold that an employer that

1 withholds wages owed at termination under a bona fide belief that it has that authority does
2 not act willfully. Those cases indicate that what an employer “knows” includes only those
3 facts that it believes in good faith to be true. The Supreme Court has never overruled those
4 cases, and, indeed, it continues to cite them. *See Taylor*, 329 Or at 469 (citing *Johnston*).

5 Plaintiff’s motion to strike must be denied.

6 **C. Plaintiff’s Request for Additional 39C Depositions must be Denied.**

7 Plaintiff next contends that this Court should order a 39C deposition of a corporate
8 representative to testify about efforts to locate, preserve and produce all termination reports “both
9 prior to and after the March 7, 2008 hearing...”. Notably, the termination reports that Plaintiff
10 requested in discovery would have been created, and presumably printed and retained, at least one
11 year prior to the hearing, and likely before that.

12 AutoZone’s counsel is prepared to represent that a good faith search has been conducted,
13 including, but not limited to, printing out each terminated employee’s personnel file and searching
14 each file for a termination report.

15 **D. Plaintiff’s Motion should be Denied in its Entirety.**

16 There is no evidence before this Court that AutoZone is not in compliance with the Court’s
17 order. AutoZone produced all pay records for all terminated employees, produced relevant training
18 materials, memos issued by the Payroll Director, and all termination reports that can be located.
19 Plaintiff fails to establish any basis to impose the onerous sanctions, including the request for
20 attorney fees and costs, that are requested.
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1 Dated: June 5, 2008

2
3 

4 Leigh Ann Collings Tift OSB No.05473

5 LITTLER MENDELSON

6 A Professional Corporation

7 Attorneys for Defendant

8 Autozone Inc.

CERTIFICATE OF SERVICE

I hereby certify that on May 5, 2008, I served a full, true, and correct copy of the foregoing:

**DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION TO
ENFORCE COURT ORDER AND MEMORANDUM IN SUPPORT THEREOF**

- ☐ By delivery via messenger, or otherwise by hand,
☒ By facsimile,
☐ By e-mail,
☒ By mailing same, postage paid

addressed to:

Bailey Pinney & Associates LLC
Attorneys at Law
1498 SE Tech Center Place
Suite 290
Vancouver, WA 98683
Fax (360) 567-3331

Of Attorneys for Plaintiff

By



Savanna Stevens

Firmwide:85393409.1 013306.2124

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3 IN THE CIRCUIT COURT OF THE STATE OF OREGON
4
5 FOR THE COUNTY OF MULTNOMAH

6 MICHAEL MIGIS, individually, and on
7 behalf of all other persons similarly
8 situated,,
9

10 Plaintiff,

11 vs.

12 AUTOZONE INC., a Nevada
13 Corporation,,
14

15 Defendant.
16

No. 0711-13531

**DEFENDANT'S OBJECTIONS TO MAY 22,
2008 STATEMENT OF ATTORNEY FEE
REQUEST**

17 Defendant AutoZone, Inc. ("Defendant") incorporates its previously filed objections to
18 Plaintiff's request for award of attorney fees relative to AutoZone's April 22, 2008 Motion for an
19 Extension of Time. Plaintiff's counsel made a token effort to eliminate time spent on unrelated
20 matters--which were pointed out in AutoZone's first objections-- but the effect is nominal.
21 Plaintiff's fee request has been reduced from \$9,056.00 to \$8,631.00 (with an additional \$45.00 in
22 costs). The revised fee request does not cure the most significant of the issues presented by
23 AutoZone's first objection: The motion for an extension of time was noted on an expedited basis
24 and less than 30 minutes was allowed for argument. Given the amount of time permitted by the
25 Court and the fact it was an expedited motion, Plaintiff's effective hourly rate is in the neighborhood
26 of \$16,000/hour.

Plaintiff's expenditure of time for this hearing is exorbitant and the Court should
significantly reduce the fee award to reflect the simplicity of the issue presented as well as the
brevity of the proceedings.

1
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3 Dated: June 5, 2008
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Leigh Ann Collings Tift OSB No.05473
LITTLER MENDELSON
A Professional Corporation

7 Attorneys for Defendant
8 Autozone Inc.
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CERTIFICATE OF SERVICE

I hereby certify that on June 5, 2008, I served a full, true, and correct copy of the foregoing:

**DEFENDANT'S OBJECTIONS TO MAY 22, 2008
STATEMENT OF ATTORNEY FEE REQUEST**

- ☐ By delivery via messenger, or otherwise by hand,
☒ By facsimile,
☐ By e-mail,
☒ By mailing same, postage paid

addressed to:

Bailey Pinney & Associates LLC
Attorneys at Law
1498 SE Tech Center Place
Suite 290
Vancouver, WA 98683
Fax (360) 567-3331

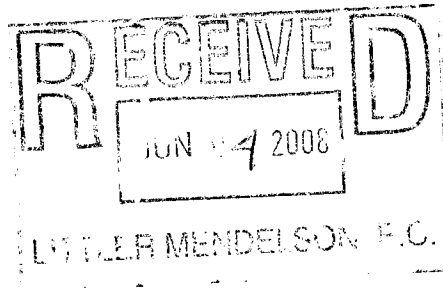
Of Attorneys for Plaintiff

By



Savanna L. Stevens

Firmwide:85451918.1 013306.2124



**IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH**

MICHAEL MIGIS, individually, and on
behalf of all others similarly situated,

Plaintiff,

v.

AUTOZONE, INC.,

Defendant.

Case No. **0711-13531**

**PLAINTIFF'S RESPONSE TO
DEFENDANT'S MOTION FOR
PROTECTIVE ORDER AND
MEMORANDUM IN SUPPORT
THEREOF**

Date: **July 11, 2008**

Time: **1:30 p.m.**

Court: **The Hon. Jerome LaBarre**

Rm: **702**

I. INTRODUCTION

The Court should deny Defendant's *Motion for Protective Order* in its entirety because AutoZone has not made a showing of good cause that ORCP 36C requires. That is, AutoZone:

1. Fails to submit an affidavit from AutoZone or the proposed ORCP 39C(6) designee explaining why his brief absence from the corporate office will create an undue hardship on AutoZone, who is the deponent; and
2. Otherwise fails to articulate the specific oppression, undue burden or expense that AutoZone will suffer if it must produce a designee to testify in Oregon.

Plaintiff supports this *Response* with the *Declaration of Chey K. Powelson* ("*Powelson Decl.*").

///

1 Upon denying Defendant's *Motion*, the Court should order AutoZone to, within four (4)
 2 business days of hearing on this matter, produce one or more persons to appear in Oregon and
 3 testify as to the issues set forth in Plaintiff's ORCP 39C(6) Notice of Deposition. ORCP 36C.

4 II. BACKGROUND

5 AutoZone's October 2007 Form 10-K filing with the U.S. Securities & Exchange
 6 Commission indicates that as of August 25, 2007, AutoZone: (1) operated 3,933 domestic stores;
 7 (2) employed approximately 53,000 people domestically; (3) operated 25 stores in the State of
 8 Oregon; and (4) experienced a 52 week gross profit of over \$3 billion.¹

9 Plaintiff's ORCP 39C(6) Notice of Deposition set the deposition of AutoZone to take
 10 place in Oregon on Friday, May 30, 2008. Prior to that deposition, AutoZone confirmed it would
 11 not produce anyone. *Powelson Decl.*, Ex. B.

12 Although AutoZone in its *Motion* references several proposals for resolving the current
 13 dispute, AutoZone did not inform the Court of all the circumstances leading to this impasse.

14 First, AutoZone already *denied* three of Plaintiff's Requests For Admission, which
 15 Plaintiff based on the proposed designee's prior, individual deposition testimony in August 2005.
 16 See *Powelson Decl.*, Ex. C. Plaintiff informed Defendant's counsel that "[t]hese types of denials
 17 create more work for everyone * * * ." *Id.*, Ex. D.

18 Second, many of the ORCP 39C(6) topics for deposition in this case could not possibly
 19 have been addressed in a prior *Joarnt v. AutoZone* individual deposition of an AutoZone manager

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22 <http://yahoo.brand.edgar-online.com/displayfilinginfo.aspx?FilingID=5487038-10667-45360&type=sect&TabIndex=2&companyid=5925&ppu=%252fdefault.aspx%253fcompanyid%253d5925>, and
 23 <http://yahoo.brand.edgar-online.com/displayfilinginfo.aspx?FilingID=5487038-126451-128738&type=sect&TabIndex=2&companyid=5925&ppu=%252fdefault.aspx%253fcompanyid%253d5925>, and
 24 <http://yahoo.brand.edgar-online.com/displayfilinginfo.aspx?FilingID=5487038-68889-76719&type=sect&TabIndex=2&companyid=5925&ppu=%252fdefault.aspx%253fcompanyid%253d5925> (visited on June 2, 2008). See also *Powelson Decl.*, Ex. A.
 25
 26

almost three years ago. The ORCP 39C(6) topics themselves clearly demonstrate this, since they request deposition testimony from AutoZone on, *inter alia*: (a) AutoZone policies and procedures regarding, and efforts taken between *November 2006 and November 2007* to comply with Oregon laws and regulations governing the payment of final wages to hourly employees; (b) AutoZone termination information relating to Plaintiff Migis; (c) AutoZone's hourly employee time records created between April 2005 and November 2007; and (d) AutoZone's document production in this case.

Those narrowly-tailored topics, when combined with Defendant's knee-jerk denials to Plaintiff's Requests For Admission and claims of an un-specified burden, cannot now justify AutoZone's position that Plaintiff either stipulate to individual deposition testimony taken in 2005, or travel to Memphis because AutoZone cannot be bothered with this lawsuit.

III. POINTS & AUTHORITIES

Under both the general good cause requirements, and the good cause factors to be considered when determining the location of a 39C(6) deposition, AutoZone fails to establish why it should not appear in Oregon to testify on wage and hour issues affecting, at minimum, hundreds of hourly Oregon employees.

1. Good Cause (Generally)

"A party may unilaterally choose the place for deposing an opposing party, subject to the granting of a protective order by the Court * * * designating a different place." *Cadent Ltd. v. 3M Unitek Corp.*, 232 F.R.D. 625, 628 (C.D.Cal. 2005). "A party seeking a protective order to prevent or postpone a deposition must show good cause and the specific need for protection." *Hussey v. State Farm Lloyds Ins. Co.*, 216 F.R.D. 591, 595 (E.D.Tx. 2003).²

² Since ORCP 36 is similar to Fed.R.Civ.Pro. 26, Federal cases construing the latter are persuasive. See *Citizens' Util. Bd. v. Pub. Util. Comm'n*, 128 Or App at 656; and *Stevens v. Czerniak*, 336 Or 392, 402 (2004).

Moreover, a protective order should issue only if there is a good cause “showing that any of the harms listed in the rule are threatened and can be avoided **without impeding** the discovery process.” *Flower v. T.R.A. Indus., Inc.*, 127 Wash App 13, 38 (2005) (bold added)).

In Oregon, a party that seeks a protective order by claiming potential harm, such as undue burden or expense, must show that the harm is “significant, not a mere trifle.” *Citizens’ Util. Bd.*, 128 Or App at 658. “Broad allegations of harm unsubstantiated by specific examples or articulated reasoning do not satisfy the good cause requirement.” *Id.*

This is the commonly accepted view among various courts. See e.g., *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 102 n.16 (1981) (good cause requires “a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements.”); *Rivera v. NIBCO, Inc.*, 384 F.3d 822, 827 (9th Cir. 2004) (“Courts have held that the showing of ‘good cause’ under Rule 26 is a heavy burden.”); *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1121 (3rd Cir. 1986) (“Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not satisfy the Rule 26(c) test.”); *Sentry Ins. v. Shivers*, 164 F.R.D. 255, 257 (D.Kan. 1996) (“During the course of litigation, parties will generally incur expenses. Defendants have provided no evidence, by affidavit or otherwise, of undue burden.”); *Hussey*, 216 F.R.D. at 596 (“[Defendant] has not shown that allowing the discovery requested will cause it an undue burden or expense. Accordingly, the Court finds no good cause to enter a protective order * * *.”); *Resolution Trust Corp. v. Worldwide Ins. Management Corp.*, 147 F.R.D. 125, 127 (N.D.Tx. 1992); and *United States v. Panhandle Eastern Corp.*, 118 F.R.D. 346, 349-50 (D.Del. 1988).

AutoZone fails to concretely articulate the hardship, much less any “undue hardship,” the absence of its proposed designee will cause for the corporation. Instead, AutoZone’s counsel only generally contends: (1) that “it is difficult for [the designee] to remove himself from [his] duties”; and (2) that because of a “time difference” between Memphis, Tennessee and Portland,

1 Oregon, it will apparently take the designee two full days to travel to and from Oregon.
 2 Defendant's counsel also speculates, without reason, that the deposition will "likely not last even
 3 half a day." See Defendant's *Motion for Protective Order*, pp. 3 - 4.³

4 In other words, Defendant failed to submit a declaration or affidavit from the designee
 5 himself (or another AutoZone corporate manager), explaining under oath what type or types of
 6 harm the designee's absence will cause. And Defendant counsel's affidavit is insufficient
 7 because it sets forth only hearsay, indicating that she talked to the proposed designee, who said
 8 that traveling to Portland "is a hardship for him * * * ." See Defendant's *Tift Declaration*, ¶ 12.
 9 (This is most likely a waiver of the attorney-client privilege, and so if the deposition must occur
 10 in Memphis, then, Plaintiff will ask Mr. Dessem about his conversations with Ms. Tift.)

11 Defendant is completely silent, however, as to whether its designee's absence could be
 12 mitigated by using the modern technology available to most upper-level managers for large
 13 corporations: cell phones, laptop computers, personal digital assistants, wireless Internet access,
 14 virtual desktops, e-mail and text messaging.

15 Had the designee himself averred under oath that he nor anyone else does not, can not,
 16 and would not be able to use any of the foregoing technology while out of the office, then
 17 Defendant would have at least come closer to meeting the heavy burden that ORCP 36C requires.

18 But without any such affidavit or other specific explanations, it is difficult to believe that
 19 a corporation as large as AutoZone would suffer an undue hardship by not having one of its
 20 managers physically present in Tennessee.

21 ///

22
 23 ³ The May 15, 2008 ORCP 39C(6) deposition took most of one day. Moreover, Exhibit
 24 5 to the declaration of Defendant's counsel Leigh Ann Tift clearly sets forth Plaintiff's position:
 25 that it would **not** "be overly burdensome for AutoZone to produce Mr. Dessem for deposition in
 26 Oregon, where Defendant operates well over 20 retail stores, and where there are important socio-
 economic issues at stake in the litigation * * * ." The Court should also note that the deponent
 is AutoZone, not Mr. Dessem.

1 **2. “Good Cause” When Considering the Location of an ORCP 39C(6)**
2 **Deposition**

3 “Corporate defendants are frequently deposed in places other than the location of the
4 principal place of business, especially in the [litigation] forum, for the convenience of all parties
5 and in the general interests of judicial economy.” *Sugarhill Records, Ltd. v. Motown Record*
6 *Corp.*, 105 F.R.D. 166, 171 (S.D.N.Y. 1985). Accord, *Cadent*, 232 F.R.D. at 629 (citing
7 *Sugarhill*). See also ORCP 1B. Another reason supporting the litigation forum as the proper
8 location for deposition is the extent to which the corporation does business within the forum, and
9 whether it has freely taken advantage of the rules of discovery. See e.g., *New Medium Techs.*
10 *LLC v. Barco N.V.*, 242 F.R.D. 460, 467-68 (N.D.Ill. 2007) (in context of determining the
11 location for deposing non-U.S., foreign corporations).

12 Generally, that a defendant “will incur additional expense by attending * * * noticed
13 depositions does **not** show undue burden or good cause for a protective order.” *Shivers*, 164
14 F.R.D. at 257 (bold added). It is also unlikely that, in the absence of a declaration to the contrary,
15 the travel and brief absence of a manager for a large corporation will impose upon the corporation
16 a severe or undue burden. See *Sugarhill* at 171; *Tomingas v. Douglas Aircraft Co.*, 45 F.R.D.
17 94, 97 (S.D.N.Y. 1968) (“[T]here has been no showing that any harm would result to defendant’s
18 business by virtue of the deponents’ brief absence from their jobs.”); and *Cadent*, 232 F.R.D. at
19 629 (“[N]either party has provided the Court with declarations from its corporate officers
20 attesting to either the expense or undue burden associated with * * *” specific locations for the
21 noticed depositions.).

22 In addition to the foregoing, when determining the location of the deposition of a
23 corporation, a court may consider: (a) location of counsel for the parties in the forum district; (b)
24 the number of corporate representatives a party is seeking to depose; (c) the likelihood of
25 significant discovery disputes arising which would necessitate resolution by the forum court; (d)
26 whether the persons sought to be deposed often engage in travel for business purposes; and (e)

1 the equities with regard to the nature of the claim and the parties' relationship. *Cadent*, 232
 2 F.R.D. at 629. "Among the more significant factors * * * are whether the time, expense, and
 3 inconvenience of travel presents a **special hardship** for the deponent, and the ability of the court
 4 to intervene should disputes arise * * * ." *New Medium Techs.*, 242 F.R.D. at 467 (bold added)
 5 (cites omitted). "[A]n antecedent history of contentiousness is a sufficient, but not a necessary
 6 basis on which to require a deposition in a locale where judicial supervision will be available."
 7 *Id.*

8 Evaluation of the foregoing factors, in conjunction with AutoZone's general failure to
 9 articulate good cause, dictates that a protective order is not appropriate. First, counsel for both
 10 parties reside in or very near the litigation forum. Second, it appears that only one corporate
 11 designee needs to travel and appear (as opposed to two attorneys traveling to Memphis), and no
 12 "special hardship" to AutoZone is evident. Third, there is undoubtedly a strong likelihood that
 13 significant discovery disputes may occur during the deposition.⁴ Fourth, Defendant is silent as
 14 to whether the proposed designee generally or frequently engages in business travel. Finally, this
 15 is a putative wage and hour class action involving, at minimum, hundreds of people who worked
 16 or are working in the State of Oregon for a defendant-employer using the corporate form to
 17 conduct business.⁵

18 ///

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24 ⁴ See generally, Plaintiff's *Supplemental Briefing Supporting Plaintiff's Motion to Enforce*
 25 *Court Order*, and Plaintiff's *Motion to Bind and/or Compel ORCP 39C(6) Answers*.

26 ⁵ Defendant's counsel has already conceded that the class is "enormous." See transcript
 (pp. 6:22-24) of the April 22, 2008 hearing on Defendant's *Motion for Extension of Time*.

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IV. CONCLUSION

In sum, in light of the equities and the importance of the socio-economic issues at stake in this case, and in the absence of any good cause showing, Plaintiff respectfully requests the Court deny Defendant's *Motion*, and instead order that within four (4) business days of hearing on this matter, AutoZone produce one or more persons to testify in Oregon as to the topics set forth in Plaintiff's First Amended ORCP 39C(6) Notice of Deposition.

DATED this 2nd day of June 2008.

BAILEY, PINNEY & ASSOCIATES, LLC



CHEY POWELSON, OSB 03551
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that I caused to be served the foregoing *Response to Defendant's Motion for Protective Order and Memorandum in Support Thereof* upon:

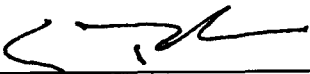
Leigh Ann Tift
Littler Mendelson
One Union Square
600 University Street Suite 3200
Seattle WA 98101-3122
Attorney for Defendant AutoZone

by the following indicated method or methods:

☒ by causing a full, true, and correct copy thereof to be deposited in the U.S. Mail service to the person listed above on the date set forth below.

DATED June 2, 2008

BAILEY, PINNEY & ASSOCIATES, LLC



CHEY POWELSON, OSB 035512
Attorney for Plaintiff

**Declaration of Chey K. Powelson
Supporting Plaintiff's Response to
Defendant's Motion for Protective Order**

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5 **IN THE CIRCUIT COURT OF THE STATE OF OREGON**
6 **FOR THE COUNTY OF MULTNOMAH**
7

8 **MICHAEL MIGIS**, individually and on behalf
9 of all others similarly situated,

10 Plaintiff,

11 v.

12 **AUTOZONE, INC.**,

13
14 Defendant.
15

Case No. 0711-13531

**DECLARATION OF CHEY K.
POWELSON SUPPORTING
PLAINTIFF'S RESPONSE TO
DEFENDANT'S MOTION FOR
PROTECTIVE ORDER**

16 I, Chey K. Powelson, hereby declare as follows:

- 17 1. I am one of the attorneys for Plaintiff herein. I am competent to testify in this matter,
18 and base the contents of this declaration on my own personal knowledge and/or the
19 litigation files and documents my firm maintains for this litigation.
20
21 2. Attached hereto as **Exhibit A** is a true and correct copy of excerpts from AutoZone's
22 Securities & Exchange Commission filings, including a Form 10-K setting forth
23 various financial information available to AutoZone as of August 2007. I printed
24 this exhibit from the following website pages on June 2, 2008:
25 [http://yahoo.brand.edgar-online.com/displayfilinginfo.aspx?FilingID=5487038-10](http://yahoo.brand.edgar-online.com/displayfilinginfo.aspx?FilingID=5487038-10667-45360&type=sect&TabIndex=2&companyid=5925&ppu=%252fdefault.aspx)
26 [667-45360&type=sect&TabIndex=2&companyid=5925&ppu=%252fdefault.aspx](http://yahoo.brand.edgar-online.com/displayfilinginfo.aspx?FilingID=5487038-10667-45360&type=sect&TabIndex=2&companyid=5925&ppu=%252fdefault.aspx)

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[http://yahoo.brand.edgar-online.com/displayfilinginfo.aspx?FilingID=5487038-68889-76719&type=sect&TabIndex=2&companyid=5925&ppu=%252fdefault.aspx](http://yahoo.brand.edgar-online.com/displayfilinginfo.aspx?FilingID=5487038-68889-76719&type=sect&TabIndex=2&companyid=5925&ppu=%252fdefault.aspx%253fcompanyid%253d5925)
 %253fcompanyid%253d5925.

3. Attached hereto as **Exhibit B** is a true and correct copy of an e-mail exchange between myself and Defendant counsel, wherein Defendant's counsel confirmed that AutoZone would not be producing anyone for the ORCP 39C(6) deposition scheduled for May 30, 2008.
4. Attached hereto as **Exhibit C** is a true and correct copy of excerpts from Plaintiff's Second Requests For Admission, in which Plaintiff had already attempted to establish that certain payroll policies and practices Mr. Dessem as an individual for AutoZone had testified to in August 2005, still applied after that time. Defendant denied those Requests For Admission.
5. Attached hereto as **Exhibit D** is a true and correct copy of my e-mail to Defendant's counsel explaining that Defendant's denials to Requests For Admission create more work.

I HEREBY DECLARE THAT THE ABOVE STATEMENT IS TRUE TO THE BEST OF MY KNOWLEDGE AND BELIEF, AND THAT I UNDERSTAND IT IS MADE FOR USE AS EVIDENCE IN COURT AND IS SUBJECT TO PENALTY FOR PERJURY.

Dated this 25th day of June 2008 at Vancouver, Washington.


 CHEY POWELSON, OSB 03551
 Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that I caused to be served the foregoing *Declaration of Chey K. Powelson*
Supporting Plaintiff's Response to Defendant's Motion for Protective Order upon:

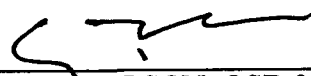
Leigh Ann Tift
Littler Mendelson
One Union Square
600 University Street Suite 3200
Seattle WA 98101-3122
Attorney for Defendant AutoZone

by the following indicated method or methods:

☒ by causing a full, true, and correct copy thereof to be deposited in the U.S. Mail
service to the person listed above on the date set forth below.

DATED June 2, 2008

BAILEY, PINNEY & ASSOCIATES, LLC



CHEY POWELSON, OSB 035512
Attorney for Plaintiff

Exhibit A

Item 1. Business**Introduction**

We are the nation's leading specialty retailer and a leading distributor of automotive replacement parts and accessories, with most of our sales to do-it-yourself ("DIY") customers. We began operations in 1979 and at August 25, 2007 operated 3,933 stores in the United States and Puerto Rico, and 123 in Mexico. Each of our stores carries an extensive product line for cars, sport utility vehicles, vans and light trucks, including new and remanufactured automotive hard parts, maintenance items, accessories and non-automotive products. In many of our stores we also have a commercial sales program that provides commercial credit and prompt delivery of parts and other products to local, regional and national repair garages, dealers and service stations. We also sell the ALLDATA brand automotive diagnostic and repair software. On the web at www.autozone.com, we sell diagnostic and repair information, auto and light truck parts, and accessories. We do not derive revenue from automotive repair or installation services.

At August 25, 2007, our stores were in the following locations:

Alabama	90
Arizona	110
Arkansas	59
California	428
Colorado	55
Connecticut	31
Delaware	10
Florida	173
Georgia	160
Idaho	18
Illinois	192
Indiana	125
Iowa	22
Kansas	37
Kentucky	74
Louisiana	97
Maine	6
Maryland	38
Massachusetts	66
Michigan	133
Minnesota	22
Mississippi	81
Missouri	90
Montana	1
Nebraska	13
Nevada	42
New Hampshire	16
New Jersey	57
New Mexico	54
New York	112
North Carolina	145
North Dakota	2
Ohio	205
Oklahoma	66
Oregon	25
Pennsylvania	

EXHIBIT A
Page 1-7

Puerto Rico	15
Rhode Island	15
South Carolina	68
South Dakota	1
Tennessee	145
Texas	492
Utah	34
Vermont	1
Virginia	81
Washington	44
Washington, DC	6
West Virginia	22
Wisconsin	48
Wyoming	5
Domestic Total	<u>3,933</u>
Mexico	<u>123</u>
TOTAL	<u>4,056</u>

Store Personnel and Training

Each store typically employs from 10 to 16 AutoZoners, including a manager and, in some cases, an assistant manager. AutoZoners typically have prior automotive experience. All AutoZoners are encouraged to complete courses resulting in certification by the National Institute for Automotive Service Excellence ("ASE"), which is broadly recognized for training certification in the automotive industry. Although we do on-the-job training, we also provide formal training programs, including an annual national sales meeting, regular store meetings on specific sales and product issues, standardized training manuals and a specialist program that provides training to AutoZoners in several areas of technical expertise from both the Company and from independent certification agencies. Training is supplemented with frequent store visits by management.

Store managers receive financial incentives through performance-based bonuses. In addition, our growth has provided opportunities for the promotion of qualified AutoZoners. We believe these opportunities are important to attract, motivate and retain high quality AutoZoners.

All store support functions are centralized in our store support centers located in Memphis, Tennessee and Mexico. We believe that this centralization enhances consistent execution of our merchandising and marketing strategies at the store level, while reducing expenses and cost of sales.

Store Automation

All of our stores have Z-net TM, our proprietary electronic catalog that enables our AutoZoners to efficiently look up the parts our customers need and provides complete job solutions, advice and information for customer vehicles. Z-net TM provides parts information based on the year, make, model and engine type of a vehicle and also tracks inventory availability at the store, at other nearby stores and through special order. The Z-net TM display screens are placed on the hard parts counter or pods, where both AutoZoners and customers can view the screen. In addition, our wide area network enables the stores to expedite credit or debit card and check approval processes, to access immediately national warranty data, to implement real-time inventory controls and to locate and hold parts at neighboring AutoZone stores.

Our stores utilize our computerized proprietary Store Management System, which includes bar code scanning and point-of-sale data collection terminals. The Store Management System provides administrative assistance and improved personnel scheduling at the store level, as well as enhanced merchandising information and improved inventory control. We believe the Store Management System also enhances customer service through faster processing of transactions and simplified warranty and product return procedures.

Store Development

The following table reflects store development during the past five fiscal years:

	Fiscal Year				
	2007	2006	2005	2004	2003
Beginning Domestic Stores	3,771	3,592	3,420	3,219	3,068
New Stores	163	185	175	202	160
Closed Stores	1	6	3	1	9
Net New Stores	162	179	172	201	151
Relocated Stores	18	18	7	4	6
Ending Domestic Stores	3,933	3,771	3,592	3,420	3,219
Ending Mexico Stores	123	100	81	63	49
Ending Total Stores	4,056	3,871	3,673	3,483	3,268

EXHIBIT

Page 3-7

The domestic stores include stores in the United States and Puerto Rico. The new store count in 2007 reflects 3 stores that were temporarily closed during fiscal 2006 and excluded from the prior year ending store count. We believe that expansion opportunities exist both in markets that we do not currently serve, as well as in markets where we can achieve a larger presence. We attempt to obtain high visibility sites in high traffic locations and undertake substantial research prior to entering new markets. The most important criteria for opening a new store are its projected future profitability and its ability to achieve our required investment hurdle rate. Key factors in selecting new site and market locations include population, demographics, vehicle profile, number and strength of competitors' stores and the cost of real estate. In reviewing the vehicle profile, we also consider the number of vehicles that are seven years old and older- "our kind of vehicles," as these are generally no longer under the original manufacturers' warranties and will require more maintenance and repair than younger vehicles. We generally seek to open new stores within or contiguous to existing market areas and attempt to cluster development in markets in a relatively short period of time. In addition to continuing to lease or develop our own stores, we evaluate and may make strategic acquisitions.

Purchasing and Supply Chain

Merchandise is selected and purchased for all stores through our store support centers located in Memphis, Tennessee and Mexico. No one class of product accounts for as much as 10 percent of our total sales. In fiscal 2007, no single supplier accounted for more than 10 percent of our total purchases. We generally have few long-term contracts for the purchase of merchandise. We believe that we have good relationships with suppliers. We also believe that alternative sources of supply exist, at similar cost, for most types of product sold. Most of our merchandise flows through our distribution centers to our stores by our fleet of tractors and trailers or by third-party trucking firms.

Our hub stores have increased our ability to distribute products on a timely basis to many of our stores. A hub store is able to provide replenishment of products sold and deliver other products maintained only in hub store inventories to a store in its coverage area generally within 24 hours. Hub stores are generally replenished from distribution centers multiple times per week.

Competition

The sale of automotive parts, accessories and maintenance items is highly competitive in many areas, including name recognition, product availability, customer service, store location and price. AutoZone competes in both the retail ("DIY") and commercial do-it-for-me ("DIFM") auto parts and accessories markets.

Competitors include national and regional auto parts chains, independently owned parts stores, wholesalers and jobbers, repair shops, car washes and auto dealers, in addition to discount and mass merchandise stores, department stores, hardware stores, supermarkets, drugstores, convenience stores and home stores that sell aftermarket vehicle parts and supplies, chemicals, accessories, tools and maintenance parts. AutoZone competes on the basis of customer service, including the trustworthy advice of our AutoZoners, merchandise selection and availability, price, product warranty, store layouts and location.

Trademarks and Patents

We have registered several service marks and trademarks in the United States Patent and Trademark office as well as in certain other countries, including our service marks, "AutoZone" and "Get in the Zone," and trademarks, "AutoZone," "Duralast," "Duralast Gold," "Valucraft," "ALLDATA" and "Z-netTM." We believe that these service marks and trademarks are important components of our merchandising and marketing strategy.

Employees

As of August 25, 2007, we employed approximately 55,000 persons, approximately 56 percent of whom were employed full-time. About 93 percent of our AutoZoners were employed in stores or in direct field supervision, approximately 5 percent in distribution centers and approximately 2 percent in store support functions. Included in the above numbers are approximately 2,000 persons employed in our Mexico operations.

We have never experienced any material labor disruption and believe that relations with our AutoZoners are generally good.

Consolidated Statements of Income

(in thousands, except per share data)	Year Ended		
	August 25, 2007 (52 Weeks)	August 26, 2006 (52 Weeks)	August 27, 2005 (52 Weeks)
Net sales	\$ 6,169,804	\$ 5,948,355	\$ 5,710,882
Cost of sales, including warehouse and delivery expenses	3,105,554	3,009,835	2,918,334
Operating, selling, general and administrative expenses	2,008,984	1,928,595	1,816,884
Operating profit	1,055,266	1,009,925	975,664
Interest expense, net	119,116	107,889	102,443
Income before income taxes	936,150	902,036	873,221
Income taxes	340,478	332,761	302,202
Net income	<u>\$ 595,672</u>	<u>\$ 569,275</u>	<u>\$ 571,019</u>
Weighted average shares for basic earnings per share	69,101	75,237	78,530
Effect of dilutive stock equivalents	743	622	978
Adjusted weighted average shares for diluted earnings per share	<u>69,844</u>	<u>75,859</u>	<u>79,508</u>
Basic earnings per share	<u>\$ 8.62</u>	<u>\$ 7.57</u>	<u>\$ 7.27</u>
Diluted earnings per share	<u>\$ 8.53</u>	<u>\$ 7.50</u>	<u>\$ 7.18</u>

EXHIBIT A
 Page 6-7

Results of Operations

Fiscal 2007 Compared with Fiscal 2006

For the year ended August 25, 2007, AutoZone reported net sales of \$6.170 billion compared with \$5.948 billion for the year ended August 26, 2006, a 3.7% increase from fiscal 2006. This growth was primarily driven by an increase in the number of open stores. At August 25, 2007, we operated 3,933 domestic stores and 123 in Mexico, compared with 3,771 domestic stores and 100 in Mexico at August 26, 2006. Domestic retail sales increased 3.4% and domestic commercial sales decreased 0.4% from prior year. ALLDATA and Mexico sales increased over prior year, contributing 0.9 percentage points of the total increase in net sales. Domestic same store sales, or sales for domestic stores open at least one year, increased 0.1% from the prior year.

Gross profit for fiscal 2007 was \$3.064 billion, or 49.7% of net sales, compared with \$2.939 billion, or 49.4% of net sales, for fiscal 2006. The improvement in gross profit margin was primarily attributable to ongoing category management initiatives and supply chain efficiencies.

Operating, selling, general and administrative expenses for fiscal 2007 increased to \$2.009 billion, or 32.6% of net sales, from \$1.929 billion, or 32.4% of net sales for fiscal 2006. The increase in expenses is driven primarily by higher occupancy cost versus the prior year.

Interest expense, net for fiscal 2007 was \$119.1 million compared with \$107.9 million during fiscal 2006. This increase was primarily due to higher short term rates and higher average borrowing levels over the comparable prior year period and the recognition of interest expense on capital lease obligations that were accounted for as operating leases prior to a modification to the lease agreements in fiscal 2007. Average borrowings for fiscal 2007 were \$1.972 billion, compared with \$1.928 billion for fiscal 2006. Weighted average borrowing rates were 5.7% at August 25, 2007, compared to 5.5% at August 26, 2006.

Our effective income tax rate decreased to 36.4% of pre-tax income for fiscal 2007 as compared to 36.9% for fiscal 2006 primarily due to benefits from changes in our pre-tax earnings mix and an increase in certain federal and state tax credits. Refer to "Note D - Income Taxes" for additional information regarding our income tax rate.

Net income for fiscal 2007 increased by 4.6% to \$595.7 million, and diluted earnings per share increased by 13.6% to \$8.53 from \$7.50 in fiscal 2006. The impact of the fiscal 2007 stock repurchases on diluted earnings per share in fiscal 2007 was an increase of approximately \$0.14.

Exhibit B

Chey Powelson

From: Tift, Leigh Ann C. [LTift@littler.com]
Sent: Tuesday, May 27, 2008 1:20 PM
To: Chey Powelson; Alpern, Amy R.
Cc: Bud Bailey
Subject: RE: Migis v. AutoZone -- July 11

we will not produce a witness in Oregon on the 30th, pending a ruling on the motion for a protective order.

From: Chey Powelson [mailto:cpowelson@wagelawyer.com]
Sent: Tuesday, May 27, 2008 10:19 AM
To: Alpern, Amy R.; Tift, Leigh Ann C.
Cc: Bud Bailey; Brad Griffin; Charity Shindle
Subject: RE: Migis v. AutoZone -- July 11
Importance: High

Please also advise as to whether any designee will be appearing this Friday, May 30, for Plaintiff's ORCP 39C (6) deposition. Thanks.

From: Chey Powelson
Sent: Tuesday, May 27, 2008 9:51 AM
To: 'Alpern, Amy R.'; Tift, Leigh Ann C.
Cc: Bud Bailey; Brad Griffin; Charity Shindle
Subject: Migis v. AutoZone -- July 11
Importance: High

Counsel"

Please advise whether July 11 is an appropriate hearing date for all five motions currently "praeciped." Thanks.

Chey K. Powelson

Attorney at Law
Bailey, Pinney & Assoc., LLC
1498 SE Tech Center Pl, Ste 290
Vancouver, WA 98683
Cpowelson@wagelawyer.com
360.567.2551 (Ph)
360.567.3331 (Fax)

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EXHIBIT B

Page 1-2

6/2/2008

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To reply to our email administrator directly, send an email to postmaster@littler.com

Littler Mendelson, P.C.
<http://www.littler.com>

EXHIBIT B
Page 2-2

6/2/2008

Exhibit C

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

MICHAEL MIGIS, individually, and on
behalf of all other persons similarly
situated,

Plaintiff,

vs.

AUTOZONE, INC., a Nevada
Corporation,

Defendant.

No. 0711-13531

**DEFENDANT'S RESPONSE TO
PLAINTIFF'S SECOND REQUESTS FOR
ADMISSIONS**

Defendant AutoZone, Inc. ("Defendant" or "AutoZone") hereby submits its objections and responses to Plaintiff's Second Set of Requests for Admissions, as follows:

GENERAL OBJECTIONS

The following objections apply generally to all of Plaintiff's discovery requests in this lawsuit:

(a) Objections to Scope of Discovery Requests. Defendant objects to all discovery requests to the extent they purport to require any actions not required by the Oregon Rules of Civil Procedure, the Uniform Trial Court Rules, or any local rules. Without limiting the generality of this objection, Defendant objects to all discovery requests to the extent that they (1) go beyond the scope of discovery provided by the Oregon Rules of Civil Procedure, (2) are not reasonably calculated to lead to the discovery of admissible evidence, and/or (3) purport to impose a duty of supplementation greater than that imposed by the Oregon Rules of Civil Procedure.

(b) Privilege and Trial Preparation Materials. Defendant objects to all discovery requests to the extent they call for information or documents that fall within any relevant privilege (including

RESPONSES

REQUEST FOR ADMISSION NO. 1: From August 26, 2005 to present, AutoZone's policy for its hourly employees in the State of Oregon has been to pay its employees only for the time they are "clocked in" to the AutoZone time-keeping system.

RESPONSE: AutoZone incorporates by reference its General Objections as though fully set forth herein. AutoZone further objects to this request on the grounds that it is overbroad as to its temporal scope and accordingly seeks information not relevant to the claims and defenses of the parties and/or not calculated to lead to the discovery of admissible evidence. Plaintiff Migis terminated his employment in February 2006. No class has been certified and class certification is inappropriate. AutoZone further objects on the grounds that the phrases "clocked in" and "time-keeping system" are not defined and are thus vague and ambiguous. Without waiving the foregoing objections, AutoZone's policy is, and at all relevant times, was to pay hourly employees for all hours worked. AutoZone generally monitors hours an employee works through entries the employee posts on a component of AutoZone's payroll system by entering a unique password on a cash register at the store level (hereinafter "punching in" or "punching out," as appropriate); however, if AutoZone becomes aware an hourly employee worked while not punched in, AutoZone pays the hourly employee for time engaged in such work. Except as expressly stated herein, AutoZone denies this request.

REQUEST FOR ADMISSION NO. 2: From August 26, 2005 to present, AutoZone's policy for its hourly employees in the State of Oregon has been that the employee clock out of the AutoZone time-keeping system for their meal periods.

RESPONSE: AutoZone incorporates by reference its General Objections as though fully set forth herein. AutoZone further objects to this request on the grounds that it is overbroad as to its temporal scope and accordingly seeks information not relevant to the claims and defenses of the parties and/or not calculated to lead to the discovery of admissible evidence. Plaintiff Migis

1 terminated his employment in February 2006. No class has been certified and class certification is
2 inappropriate. AutoZone further objects on the grounds that the phrases "clock out" and "time-
3 keeping system" are not defined and are thus vague and ambiguous. Without waiving the foregoing
4 objections, AutoZone's policy does, and at all relevant times, did require that an hourly employee
5 punch out for a meal period. Except as expressly stated herein, AutoZone denies this request.

6 **REQUEST FOR ADMISSION NO. 3:** From August 26, 2005 to present, AutoZone's
7 policy for hourly employees in the State of Oregon has been that those employees not be paid for
8 any meal period less than 30 minutes.

9 **RESPONSE:** AutoZone incorporates by reference its General Objections as though fully set
10 forth herein. AutoZone further objects to this request on the grounds that it is overbroad as to its
11 temporal scope and accordingly seeks information not relevant to the claims and defenses of the
12 parties and/or not calculated to lead to the discovery of admissible evidence. Plaintiff Migis
13 terminated his employment in February 2006. No class has been certified and class certification is
14 inappropriate. Without waiving the foregoing objections, AutoZone's policy is that employees are
15 paid for all work time, and are not paid for time clocked out on a break. Except as expressly stated
16 herein, AutoZone denies this request.

17 **REQUEST FOR ADMISSION NO. 4:** The last day Plaintiff Migis worked for AutoZone
18 in the State of Oregon was February 2, 2006.

19 **RESPONSE:** AutoZone incorporates by reference its General Objections as though fully set
20 forth herein. Without waiving the foregoing objections, AutoZone admits that Plaintiff Migis last
21 punched in and punched out on February 2, 2006. See Response to Request No. 1, herein, for
22 definition of "punching in" and "punching out". Except as expressly stated herein, AutoZone denies
23 the request.
24
25
26

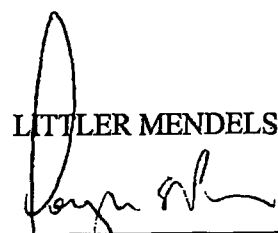
1 (2) The document designated as Exhibit B appears to be a copy of an AutoZone
2 business record. AutoZone does not know the immediate source of this document.

3 (3) The document designated as Exhibit C appears to be a copy of document AutoZone
4 business record produced by AutoZone in this litigation.

5 Except as expressly stated herein, AutoZone denies this request.

6
7 Dated: April 14, 2008

8
9
10 LITTLER MENDELSON, P.C.

11
12 
Douglas S. Parker, OSB No. 821017

13 dparker@littler.com

14 Neil N. Olsen, OSB No. 053378

15 nolsen@littler.com

16 Of Attorneys for Defendant
17 AutoZone, Inc.
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23
24
25
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Exhibit D

Chey Powelson

From: Chey Powelson
Sent: Friday, May 16, 2008 9:25 AM
To: 'Tift, Leigh Ann C.'
Cc: Alpern, Amy R.; Bud Bailey; Brad Griffin; Charity Shindle
Subject: RE: Migis v. AutoZone
Follow Up Flag: Follow up
Flag Status: Red

For purposes of streamlining the conference regarding your issues, I've reviewed the First Amended 39C(6) Notice of deposition set for May 30. That Notice includes several issues that Mark Dessem, even individually, did not speak to and could not have addressed in his 2005 deposition because, for example, the issues noticed include Defendant's document production in this case, Mr. Migis's termination, and other matters occurring in the period of time after August 2005.

From: Tift, Leigh Ann C. [mailto:LTift@littler.com]
Sent: Friday, May 16, 2008 8:25 AM
To: Chey Powelson
Cc: Alpern, Amy R.
Subject: RE: Migis v. AutoZone

The question I asked was whether you would consider a video deposition or stipulating to the testimony of Mr. Dessem. I don't think you answered either question, so let's be sure to address that in the 11:30 conference.

From: Chey Powelson [mailto:cpowelson@wagelawyer.com]
Sent: Thursday, May 15, 2008 7:20 PM
To: Alpern, Amy R.; Tift, Leigh Ann C.
Cc: Bud Bailey; Brad Griffin; Dana Pinney; Charity Shindle
Subject: RE: Migis v. AutoZone
Importance: High

Ms. Alpern:

I'll let you know when I hear from Bud, whether 11:30 tomorrow will work. Even if he is not available, I will still call to confer. In the meantime, and although I believe I recently sent Defendant via letter various case law regarding Plaintiff's understanding of the ORCP 39C(6) process (based on the Federal Fed.R.Civ.Pro. 30(b)(6)), in anticipation of our conference please consider the additional following ideas and cases which further support such understanding, and by which Plaintiff contends that Defendant failed to adequately produce one or more persons to testify on behalf of AutoZone.

Rule 30(b)(6) "streamlines the discovery process" to prevent a corporation from "bandying" or "sandbagging" the deposing party. *Black Horse Lane Assoc., L.P. v. Dow Chem. Corp.*, 228 F.3d 275, 303, 304 (3rd Cir. 2000). "[I]f a Rule 30(b)(6) witness is unable to give useful information he is no more present for the deposition than would be a deponent who physically appears...but sleeps through it." *Id.* Accord, *Resolution Trust Corp. v. Southern Union Co.*, 985 F.2d 196, 197 (5th Cir. 1993).

See also *Casper v. Esteb Enters.*, 119 Wn. App. 759 (2004); *Flower v. T.R.A. Indus., Inc.*, 127 Wn. App. 13 (2005); *Bridgell v. St. Gobain Abrasives Inc.*, 233 F.R.D. 57 (D.Mass. 2005); *Starlight Int'l, Inc. v. Herlihy*, 186 F.R.D. 626 (D.Kan. 1999); *U.S. v. Taylor*, 166 F.R.D. 356 (M.D.N.C. 1996), *aff'd*, 166 F.R.D. 367 (M.D.N.C. 1996); *Ferko v. NASCAR*, 218 F.R.D. 125, 143 (E.D.Tx. 2003); *King v. Pratt & Whitney*, 161 F.R.D. 475

EXHIBIT **D**

Page **1-4**

5/30/2008

(S.D.Fla. 1995) *aff'd*, 213 F.3d 646 (11th Cir. 2000); *Concerned Citizens v. Belle Haven Club*, 223 F.R.D. 39 (D.Conn. 2004); *Dravo Corp. v. Liberty Mut. Ins. Co.*, 164 F.R.D. 70 (D.Neb. 1996); *United States v. Taylor*, 166 F.R.D. 356 (M.D.N.C. 1996); *Buycks-Roberson v. Citibank Fed. Savings Bank*, 162 F.R.D. 338, 343 (N.D.Ill. 1995); *Calzaturificio S.C.A.R.P.A., s.p.a. v. Fabiano Shoe Co.*, 201 F.R.D. 33 (D.Mass. 2001); *Bank of New York v. Meridien Biao Bank Tanzania, Lt'd*, 171 F.R.D. 135 (S.D.N.Y. 1997) (deponent must be prepared "to the extent matters are reasonably available, whether from documents, past employees, or other sources."); *Overseas Private Investment Corp. v. Mandelbaum*, 185 F.R.D. 67 (D.D.C. 1999); and *Bregman v. District of Columbia*, 182 F.R.D. 352 (D.D.C. 1998).

Please also keep in mind that ORCP 46A provides that an evasive or incomplete answer constitutes a failure to answer. See also ORCP 46D, the case law cited in my May 12 letter to Defendant, as well as: *In re Vitamins Antitrust Litig.*, 216 F.R.D. 168, 174 (D.D.C. 2003); *Reilly v. Natwest Markets Group, Inc.*, 181 F.3d 253, 268 (2nd Cir. 1999) (citing *Commodity Futures Trading Comm'n v. Noble Metals Int'l, Inc.*, 67 F.3d 766, 770-71 (9th Cir. 1995)); and *Haraway v. NASCAR*, 213 F.R.D. 161, 165 (D.Del. 2003) (citing *Black Horse Lane Assoc., L.P.* at 301-02).

See also: *Sec. Ins. Co. v. Trustmark Ins. Co.*, 218 FRD 29 (D.Conn. 2003) (In light of affirmative duty imposed by Fed. R. Civ. P. 30(b)(6), corporate representative was obliged to gain some understanding of underlying facts, regardless of source identifying underlying facts, and to answer questions accordingly; therefore, court granted defendant's Fed. R. Civ. P. 37 motion to compel and required company to identify documents relied on by its 30(b)(6) witness and produce such documents to extent it had not done so already, as attorney-client privilege did not provide valid basis on which to refuse to divulge facts underlying company's response to defendant's allegations.)

In sum, Plaintiff's position is that, in light of the foregoing authorities and the scope of ORCP 36B to discover the facts upon which a party bases its claims or defenses (see the Oregon Court's of Appeals Asato opinion (as cited to Defendant in my April 17 and 18 letters), wherein the Court of Appeals upheld Mult. Co. Judge Christopher Marshall's sanction of a party with dismissal because it failed to provide discovery into affirmative defenses as ordered), today's ORCP 39C(6) deposition did not turn out as it should have.

Also, Ms. Tift, though I committed to getting back to you tomorrow on your requests regarding the May 30 ORCP 39C(6) Notice: (1) Whether Plaintiff will change the location or agree to video conferencing, and (2) Whether Plaintiff will stipulate to the testimony already given by Mark Dessem in 2005 in the Joarnt v. AutoZone case, be advised I double-checked the notice of deposition that went to AutoZone, and it appears Plaintiff noticed Mr. Dessem individually – AutoZone did not produce him as an ORCP 39C(6) designee, nor, I believe, as a "person most knowledgeable."

As I explained on the phone today, even if he was produced in response to a "person most knowledgeable" notice of deposition (which in the Joarnt matter only appear to be related to Defendant's document preservation efforts), that type of notice is different than an ORCP 39C(6) notice. The latter is a deposition of the corporation which has, hopefully, adequately prepared one or more designees to testify on its behalf on the issues set forth in the notice.

I also mentioned to you on the phone that, with respect to the issue of Plaintiff's possible stipulation to prior deposition testimony of Mr. Dessem, Plaintiff had already attempted through a Second Set of Requests For Admission to determine whether certain aspects of AutoZone's payroll policies/procedures/practices had been the same since, inter alia, after Mr. Dessem's August 2005 deposition.

Unfortunately, AutoZone side-stepped the Requests For Admission (Nos. 1 – 3) by interposing what look to be interrogatory answers combined with denials. These types of denials create more work for everyone, as was evidenced in today's ORCP 39C(6) deposition.

Also as a result of today's deposition, based on Defendant's objections and the designee's answers of "I don't know" and indication he would need to look at additional documents/information not before him, it appears that

EXHIBIT D
Page 2-4

AutoZone should immediately produce additional documents and information in response to the two Court Orders at issue. This does undercut Defendant's assertion on the record that all documents have been produced in response to the Court Orders. (NOTE: As stated in a previous letter to Defendant, there are still approximately 96 +/- "Termination Reports" that AutoZone has not yet produced because it represented it cannot find them. I informed Ms. Tift in a telephonic conference last week (Friday, perhaps) that Plaintiff's supplemental briefing re: Plaintiff's Motion to Enforce Court Order will have to address the implications of such non-production. As you know, Plaintiff cannot simply wait for responsive documents to appear. We previously proposed to the Court a filing date for class certification of mid-August, but non-production and non-answers have made such a deadline rather untenable.).

So either (1) AutoZone has produced all documents/information and today's designee was simply not prepared to testify as to the content/sources of information of Bates Nos. AZ/MIGIS 0001212 – 1215 and the meaning of the PeopleSoft termination/action codes (I believe at one point he said that he would have to look at additional documents because he could not tell from the (a) summary report, (b) Paycheck Data, and (c) Termination Report whether an employee who quit with 2 weeks' notice was actually his final paycheck timely. Bear in mind that Defendant represented to the Court on April 22 that it needed more time to produce the Termination Reports because that information would show why the apparent late pays on the summary report were not really late at all), or (2) Defendant has not produced all responsive documents that would have allowed today's corporate designee to testify.

Finally, we will need to discuss whether Defendant is available June 30 and July 2.

Chey Powelson

From: Alpern, Amy R. [mailto:AAIpern@littler.com]

Sent: Thursday, May 15, 2008 5:33 PM

To: Chey Powelson

Subject: Re: Migis v. AutoZone

Chey,

Please call me at 11:30 tomorrow. Please have Bud Bailey on the line and I will include Leigh Ann. I'd like to get this case on a productive track and would like all players to participate. If Bud is not available, please let me know when he is available.

Best regards,

Amy

----- Original Message -----

From: Chey Powelson <cpowelson@wagelawyer.com>

To: Alpern, Amy R.

Cc: Tift, Leigh Ann C.; Brad Griffin <bgriffin@wagelawyer.com>; Bud Bailey <bbailey@wagelawyer.com>; Charity Shindle <charity@wagelawyer.com>

Sent: Thu May 15 17:03:36 2008

Subject: Migis v. AutoZone

Ms. Alpern:

Please call me by the end of the day tomorrow to confer on the ORCP 39C(6) deposition that occurred today. I already tried to confer with Ms. Tift, but she was unable to.

Thank you in advance.

Chey K. Powelson

EXHIBIT D

Page 3-4

5/30/2008

Attorney at Law

Bailey, Pinney & Assoc., LLC

1498 SE Tech Center Pl, Ste 290

Vancouver, WA 98683

Cpowelson@wagelawyer.com

360.567.2551 (Ph)

360.567.3331 (Fax)

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Littler Mendelson, P.C.
<http://www.littler.com>

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<http://www.littler.com>

EXHIBIT D
Page 4-4

5/30/2008

BAILEY, PINNEY & ASSOCIATES, LLC

Attorneys at Law

**1498 SE TECH CENTER PLACE, SUITE 290
VANCOUVER, WA 98683**

CHARITY SHINDLE

Telephone (360) 567-2551

Facsimile (360) 567-3331

e-mail: charity@wagelawyer.com

June 2, 2008

The Honorable Jerome LaBarre
1021 SW 4th Avenue, Rm. 702
Portland, OR 97204

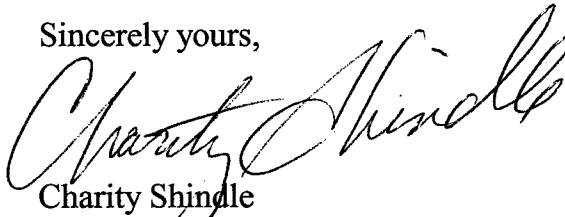
**Re: Michael Migis vs. Autozone, Inc.
Case No. 0711-13531**

Dear Judge LaBarre:

Enclosed for filing please find an Plaintiff's Response to Defendant's Motion for Protective Order and Memorandum in Support Thereof, Declaration of Chey K. Powelson Supporting Plaintiff's Response to Defendant's Motion for Protective Order and supporting documents.

Thank you for your attention to this matter.

Sincerely yours,



Charity Shindle
Legal Assistant

Enclosure

cc: Leigh Ann Tift

BAILEY, PINNEY & ASSOCIATES, LLC

Attorneys at Law
1498 SE TECH CENTER PLACE, SUITE 290
VANCOUVER, WA 98683

CHARITY SHINDLE

Telephone (360) 567-2551
Facsimile (360) 567-3331
e-mail: charity@wagelawyer.com

June 2, 2008

MULTNOMAH COUNTY COURT CLERK
1021 SW Fourth Avenue
Portland, OR 97204

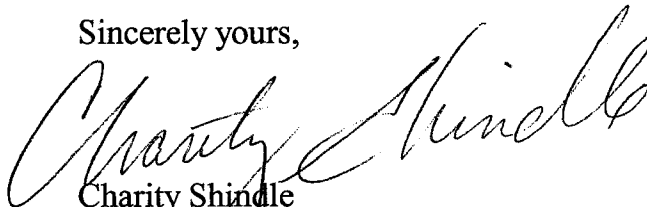
Re: *Michael Migis vs. Autozone, Inc.*
Case No. 0711-13531

Dear Clerk:

Enclosed for filing please find an Plaintiff's Response to Defendant's Motion for Protective Order and Memorandum in Support Thereof, Declaration of Chey K. Powelson Supporting Plaintiff's Response to Defendant's Motion for Protective Order and supporting documents.

Please return the enclosed prepaid filing card to our office.
Thank you for your attention to this matter.

Sincerely yours,

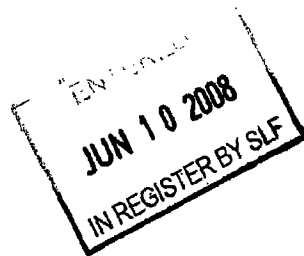

Charity Shindle
Legal Assistant

✓ Enclosure
cc: Leigh Ann Tift

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MULTNOMAH COUNTY

08 JUN -3 PM 1:31

FILED



IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

MICHAEL MIGIS, individually and on behalf
of all others similarly situated,

Plaintiff,

v.

AUTOZONE, INC.,

Defendant.

Case No. 0711-13531

DECLARATION OF CHEY K.
POWELSON SUPPORTING
PLAINTIFF'S RESPONSE TO
DEFENDANT'S MOTION FOR
PROTECTIVE ORDER

I, Chey K. Powelson, hereby declare as follows:

1. I am one of the attorneys for Plaintiff herein. I am competent to testify in this matter, and base the contents of this declaration on my own personal knowledge and/or the litigation files and documents my firm maintains for this litigation.
2. Attached hereto as **Exhibit A** is a true and correct copy of excerpts from AutoZone's Securities & Exchange Commission filings, including a Form 10-K setting forth various financial information available to AutoZone as of August 2007. I printed this exhibit from the following website pages on June 2, 2008:
<http://yahoo.brand.edgar-online.com/displayfilinginfo.aspx?FilingID=5487038-10667-45360&type=sect&TabIndex=2&companyid=5925&ppu=%252fdefault.aspx>

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 http://yahoo.brand.edgar-online.com/displayfilinginfo.aspx?FilingID=5487038-12
 6451-128738&type=sect&TabIndex=2&companyid=5925&ppu=%252fdefault.as
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 http://yahoo.brand.edgar-online.com/displayfilinginfo.aspx?FilingID=5487038-68
 889-76719&type=sect&TabIndex=2&companyid=5925&ppu=%252fdefault.aspx
 %253fcompanyid%253d5925.

3. Attached hereto as **Exhibit B** is a true and correct copy of an e-mail exchange between myself and Defendant counsel, wherein Defendant's counsel confirmed that AutoZone would not be producing anyone for the ORCP 39C(6) deposition scheduled for May 30, 2008.
4. Attached hereto as **Exhibit C** is a true and correct copy of excerpts from Plaintiff's Second Requests For Admission, in which Plaintiff had already attempted to establish that certain payroll policies and practices Mr. Dessem as an individual for AutoZone had testified to in August 2005, still applied after that time. Defendant denied those Requests For Admission.
5. Attached hereto as **Exhibit D** is a true and correct copy of my e-mail to Defendant's counsel explaining that Defendant's denials to Requests For Admission create more work.

I HEREBY DECLARE THAT THE ABOVE STATEMENT IS TRUE TO THE BEST OF MY KNOWLEDGE AND BELIEF, AND THAT I UNDERSTAND IT IS MADE FOR USE AS EVIDENCE IN COURT AND IS SUBJECT TO PENALTY FOR PERJURY.

Dated this 25th day of June 2008 at Vancouver, Washington.


 CHEY POWELSON, OSB 03551
 Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that I caused to be served the foregoing *Declaration of Chey K. Powelson*
Supporting Plaintiff's Response to Defendant's Motion for Protective Order upon:

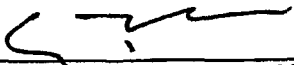
Leigh Ann Tift
Littler Mendelson
One Union Square
600 University Street Suite 3200
Seattle WA 98101-3122
Attorney for Defendant AutoZone

by the following indicated method or methods:

☒ by causing a full, true, and correct copy thereof to be deposited in the U.S. Mail
service to the person listed above on the date set forth below.

DATED June 2, 2008

BAILEY, PINNEY & ASSOCIATES, LLC



CHEY POWELSON, OSB 035512
Attorney for Plaintiff

Exhibit A

Item 1. Business**Introduction**

We are the nation's leading specialty retailer and a leading distributor of automotive replacement parts and accessories, with most of our sales to do-it-yourself ("DIY") customers. We began operations in 1979 and at August 25, 2007 operated 3,933 stores in the United States and Puerto Rico, and 123 in Mexico. Each of our stores carries an extensive product line for cars, sport utility vehicles, vans and light trucks, including new and remanufactured automotive hard parts, maintenance items, accessories and non-automotive products. In many of our stores we also have a commercial sales program that provides commercial credit and prompt delivery of parts and other products to local, regional and national repair garages, dealers and service stations. We also sell the ALLDATA brand automotive diagnostic and repair software. On the web at www.autozone.com, we sell diagnostic and repair information, auto and light truck parts, and accessories. We do not derive revenue from automotive repair or installation services.

At August 25, 2007, our stores were in the following locations:

Alabama	90
Arizona	110
Arkansas	59
California	428
Colorado	55
Connecticut	31
Delaware	10
Florida	173
Georgia	160
Idaho	18
Illinois	192
Indiana	125
Iowa	22
Kansas	37
Kentucky	74
Louisiana	97
Maine	6
Maryland	38
Massachusetts	66
Michigan	133
Minnesota	22
Mississippi	81
Missouri	90
Montana	1
Nebraska	13
Nevada	42
New Hampshire	16
New Jersey	57
New Mexico	54
New York	112
North Carolina	145
North Dakota	2
Ohio	205
Oklahoma	66
Oregon	25
Pennsylvania	

EXHIBIT A
Page 1-7

AUTOZONE INC - 10-K - 20071022 - BUSINESS

Page 2 of 15

Puerto Rico	15
Rhode Island	15
South Carolina	68
South Dakota	1
Tennessee	145
Texas	492
Utah	34
Vermont	1
Virginia	81
Washington	44
Washington, DC	6
West Virginia	22
Wisconsin	48
Wyoming	5
Domestic Total	<u>3,933</u>
Mexico	<u>123</u>
TOTAL	<u><u>4,056</u></u>

EXHIBIT A
Page 2-7

Store Personnel and Training

Each store typically employs from 10 to 16 AutoZoners, including a manager and, in some cases, an assistant manager. AutoZoners typically have prior automotive experience. All AutoZoners are encouraged to complete courses resulting in certification by the National Institute for Automotive Service Excellence ("ASE"), which is broadly recognized for training certification in the automotive industry. Although we do on-the-job training, we also provide formal training programs, including an annual national sales meeting, regular store meetings on specific sales and product issues, standardized training manuals and a specialist program that provides training to AutoZoners in several areas of technical expertise from both the Company and from independent certification agencies. Training is supplemented with frequent store visits by management.

Store managers receive financial incentives through performance-based bonuses. In addition, our growth has provided opportunities for the promotion of qualified AutoZoners. We believe these opportunities are important to attract, motivate and retain high quality AutoZoners.

All store support functions are centralized in our store support centers located in Memphis, Tennessee and Mexico. We believe that this centralization enhances consistent execution of our merchandising and marketing strategies at the store level, while reducing expenses and cost of sales.

Store Automation

All of our stores have Z-net TM, our proprietary electronic catalog that enables our AutoZoners to efficiently look up the parts our customers need and provides complete job solutions, advice and information for customer vehicles. Z-net TM provides parts information based on the year, make, model and engine type of a vehicle and also tracks inventory availability at the store, at other nearby stores and through special order. The Z-net TM display screens are placed on the hard parts counter or pods, where both AutoZoners and customers can view the screen. In addition, our wide area network enables the stores to expedite credit or debit card and check approval processes, to access immediately national warranty data, to implement real-time inventory controls and to locate and hold parts at neighboring AutoZone stores.

Our stores utilize our computerized proprietary Store Management System, which includes bar code scanning and point-of-sale data collection terminals. The Store Management System provides administrative assistance and improved personnel scheduling at the store level, as well as enhanced merchandising information and improved inventory control. We believe the Store Management System also enhances customer service through faster processing of transactions and simplified warranty and product return procedures.

Store Development

The following table reflects store development during the past five fiscal years:

	Fiscal Year				
	2007	2006	2005	2004	2003
Beginning Domestic Stores	3,771	3,592	3,420	3,219	3,068
New Stores	163	185	175	202	160
Closed Stores	1	6	3	1	9
Net New Stores	162	179	172	201	151
Relocated Stores	18	18	7	4	6
Ending Domestic Stores	3,933	3,771	3,592	3,420	3,219
Ending Mexico Stores	123	100	81	63	49
Ending Total Stores	4,056	3,871	3,673	3,483	3,268

EXHIBIT

A

The domestic stores include stores in the United States and Puerto Rico. The new store count in 2007 reflects 3 stores that were temporarily closed during fiscal 2006 and excluded from the prior year ending store count. We believe that expansion opportunities exist both in markets that we do not currently serve, as well as in markets where we can achieve a larger presence. We attempt to obtain high visibility sites in high traffic locations and undertake substantial research prior to entering new markets. The most important criteria for opening a new store are its projected future profitability and its ability to achieve our required investment hurdle rate. Key factors in selecting new site and market locations include population, demographics, vehicle profile, number and strength of competitors' stores and the cost of real estate. In reviewing the vehicle profile, we also consider the number of vehicles that are seven years old and older- "our kind of vehicles," as these are generally no longer under the original manufacturers' warranties and will require more maintenance and repair than younger vehicles. We generally seek to open new stores within or contiguous to existing market areas and attempt to cluster development in markets in a relatively short period of time. In addition to continuing to lease or develop our own stores, we evaluate and may make strategic acquisitions.

Purchasing and Supply Chain

Merchandise is selected and purchased for all stores through our store support centers located in Memphis, Tennessee and Mexico. No one class of product accounts for as much as 10 percent of our total sales. In fiscal 2007, no single supplier accounted for more than 10 percent of our total purchases. We generally have few long-term contracts for the purchase of merchandise. We believe that we have good relationships with suppliers. We also believe that alternative sources of supply exist, at similar cost, for most types of product sold. Most of our merchandise flows through our distribution centers to our stores by our fleet of tractors and trailers or by third-party trucking firms.

Our hub stores have increased our ability to distribute products on a timely basis to many of our stores. A hub store is able to provide replenishment of products sold and deliver other products maintained only in hub store inventories to a store in its coverage area generally within 24 hours. Hub stores are generally replenished from distribution centers multiple times per week.

Competition

The sale of automotive parts, accessories and maintenance items is highly competitive in many areas, including name recognition, product availability, customer service, store location and price. AutoZone competes in both the retail ("DIY") and commercial do-it-for-me ("DIFM") auto parts and accessories markets.

Competitors include national and regional auto parts chains, independently owned parts stores, wholesalers and jobbers, repair shops, car washes and auto dealers, in addition to discount and mass merchandise stores, department stores, hardware stores, supermarkets, drugstores, convenience stores and home stores that sell aftermarket vehicle parts and supplies, chemicals, accessories, tools and maintenance parts. AutoZone competes on the basis of customer service, including the trustworthy advice of our AutoZoners, merchandise selection and availability, price, product warranty, store layouts and location.

Trademarks and Patents

We have registered several service marks and trademarks in the United States Patent and Trademark office as well as in certain other countries, including our service marks, "AutoZone" and "Get in the Zone," and trademarks, "AutoZone," "Duralast," "Duralast Gold," "Valucraft," "ALLDATA" and "Z-net TM." We believe that these service marks and trademarks are important components of our merchandising and marketing strategy.

Employees

As of August 25, 2007, we employed approximately 55,000 persons, approximately 56 percent of whom were employed full-time. About 93 percent of our AutoZoners were employed in stores or in direct field supervision, approximately 5 percent in distribution centers and approximately 2 percent in store support functions. Included in the above numbers are approximately 2,000 persons employed in our Mexico operations.

We have never experienced any material labor disruption and believe that relations with our AutoZoners are generally good.

AUTOZONE INC - 10-K - 20071022 - INCOME_STATEMENT

Page 1 of 1

Consolidated Statements of Income

(in thousands, except per share data)	Year Ended		
	August 25, 2007 (52 Weeks)	August 26, 2006 (52 Weeks)	August 27, 2005 (52 Weeks)
Net sales	\$ 6,169,804	\$ 5,948,355	\$ 5,710,882
Cost of sales, including warehouse and delivery expenses	3,105,554	3,009,835	2,918,334
Operating, selling, general and administrative expenses	2,008,984	1,928,595	1,816,884
Operating profit	1,055,266	1,009,925	975,664
Interest expense, net	119,116	107,889	102,443
Income before income taxes	936,150	902,036	873,221
Income taxes	340,478	332,761	302,202
Net income	<u>\$ 595,672</u>	<u>\$ 569,275</u>	<u>\$ 571,019</u>
Weighted average shares for basic earnings per share	69,101	75,237	78,530
Effect of dilutive stock equivalents	743	622	978
Adjusted weighted average shares for diluted earnings per share	<u>69,844</u>	<u>75,859</u>	<u>79,508</u>
Basic earnings per share	<u>\$ 8.62</u>	<u>\$ 7.57</u>	<u>\$ 7.27</u>
Diluted earnings per share	<u>\$ 8.53</u>	<u>\$ 7.50</u>	<u>\$ 7.18</u>

EXHIBIT A
Page 6-7

Results of Operations**Fiscal 2007 Compared with Fiscal 2006**

For the year ended August 25, 2007, AutoZone reported net sales of \$6.170 billion compared with \$5.948 billion for the year ended August 26, 2006, a 3.7% increase from fiscal 2006. This growth was primarily driven by an increase in the number of open stores. At August 25, 2007, we operated 3,933 domestic stores and 123 in Mexico, compared with 3,771 domestic stores and 100 in Mexico at August 26, 2006. Domestic retail sales increased 3.4% and domestic commercial sales decreased 0.4% from prior year. ALLDATA and Mexico sales increased over prior year, contributing 0.9 percentage points of the total increase in net sales. Domestic same store sales, or sales for domestic stores open at least one year, increased 0.1% from the prior year.

Gross profit for fiscal 2007 was \$3.064 billion, or 49.7% of net sales, compared with \$2.939 billion, or 49.4% of net sales, for fiscal 2006. The improvement in gross profit margin was primarily attributable to ongoing category management initiatives and supply chain efficiencies.

Operating, selling, general and administrative expenses for fiscal 2007 increased to \$2.009 billion, or 32.6% of net sales, from \$1.929 billion, or 32.4% of net sales for fiscal 2006. The increase in expenses is driven primarily by higher occupancy cost versus the prior year.

Interest expense, net for fiscal 2007 was \$119.1 million compared with \$107.9 million during fiscal 2006. This increase was primarily due to higher short term rates and higher average borrowing levels over the comparable prior year period and the recognition of interest expense on capital lease obligations that were accounted for as operating leases prior to a modification to the lease agreements in fiscal 2007. Average borrowings for fiscal 2007 were \$1.972 billion, compared with \$1.928 billion for fiscal 2006. Weighted average borrowing rates were 5.7% at August 25, 2007, compared to 5.5% at August 26, 2006.

Our effective income tax rate decreased to 36.4% of pre-tax income for fiscal 2007 as compared to 36.9% for fiscal 2006 primarily due to benefits from changes in our pre-tax earnings mix and an increase in certain federal and state tax credits. Refer to "Note D - Income Taxes" for additional information regarding our income tax rate.

Net income for fiscal 2007 increased by 4.6% to \$595.7 million, and diluted earnings per share increased by 13.6% to \$8.53 from \$7.50 in fiscal 2006. The impact of the fiscal 2007 stock repurchases on diluted earnings per share in fiscal 2007 was an increase of approximately \$0.14.

Exhibit B

Chey Powelson

From: Tift, Leigh Ann C. [LTift@littler.com]
Sent: Tuesday, May 27, 2008 1:20 PM
To: Chey Powelson; Alpern, Amy R.
Cc: Bud Bailey
Subject: RE: Migis v. AutoZone -- July 11

we will not produce a witness in Oregon on the 30th, pending a ruling on the motion for a protective order.

From: Chey Powelson [mailto:cpowelson@wagelawyer.com]
Sent: Tuesday, May 27, 2008 10:19 AM
To: Alpern, Amy R.; Tift, Leigh Ann C.
Cc: Bud Bailey; Brad Griffin; Charity Shindle
Subject: RE: Migis v. AutoZone -- July 11
Importance: High

Please also advise as to whether any designee will be appearing this Friday, May 30, for Plaintiff's ORCP 39C (6) deposition. Thanks.

From: Chey Powelson
Sent: Tuesday, May 27, 2008 9:51 AM
To: 'Alpern, Amy R.'; Tift, Leigh Ann C.
Cc: Bud Bailey; Brad Griffin; Charity Shindle
Subject: Migis v. AutoZone -- July 11
Importance: High

Counsel"

Please advise whether July 11 is an appropriate hearing date for all five motions currently "praeciped." Thanks.

Chey K. Powelson
Attorney at Law
Bailey, Pinney & Assoc., LLC
1498 SE Tech Center Pl, Ste 290
Vancouver, WA 98683
Cpowelson@wagelawyer.com
360.567.2551 (Ph)
360.567.3331 (Fax)

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6/2/2008

EXHIBIT B

Page 1-2

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Littler Mendelson, P.C.
<http://www.littler.com>

Exhibit C

Apr-14-2008 04:43 PM LITTLER MENDELSON P.C. (502) 226-2791

2/9

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

MICHAEL MIGIS, individually, and on
behalf of all other persons similarly
situated,

Plaintiff,

vs.

AUTOZONE, INC., a Nevada
Corporation,

Defendant.

No. 0711-13531

**DEFENDANT'S RESPONSE TO
PLAINTIFF'S SECOND REQUESTS FOR
ADMISSIONS**

Defendant AutoZone, Inc. ("Defendant" or "AutoZone") hereby submits its objections and responses to Plaintiff's Second Set of Requests for Admissions, as follows:

GENERAL OBJECTIONS

The following objections apply generally to all of Plaintiff's discovery requests in this lawsuit:

(a) Objections to Scope of Discovery Requests. Defendant objects to all discovery requests to the extent they purport to require any actions not required by the Oregon Rules of Civil Procedure, the Uniform Trial Court Rules, or any local rules. Without limiting the generality of this objection, Defendant objects to all discovery requests to the extent that they (1) go beyond the scope of discovery provided by the Oregon Rules of Civil Procedure, (2) are not reasonably calculated to lead to the discovery of admissible evidence, and/or (3) purport to impose a duty of supplementation greater than that imposed by the Oregon Rules of Civil Procedure.

(b) Privilege and Trial Preparation Materials. Defendant objects to all discovery requests to the extent they call for information or documents that fall within any relevant privilege (including

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RESPONSES

REQUEST FOR ADMISSION NO. 1: From August 26, 2005 to present, AutoZone's policy for its hourly employees in the State of Oregon has been to pay its employees only for the time they are "clocked in" to the AutoZone time-keeping system.

RESPONSE: AutoZone incorporates by reference its General Objections as though fully set forth herein. AutoZone further objects to this request on the grounds that it is overbroad as to its temporal scope and accordingly seeks information not relevant to the claims and defenses of the parties and/or not calculated to lead to the discovery of admissible evidence. Plaintiff Migis terminated his employment in February 2006. No class has been certified and class certification is inappropriate. AutoZone further objects on the grounds that the phrases "clocked in" and "time-keeping system" are not defined and are thus vague and ambiguous. Without waiving the foregoing objections, AutoZone's policy is, and at all relevant times, was to pay hourly employees for all hours worked. AutoZone generally monitors hours an employee works through entries the employee posts on a component of AutoZone's payroll system by entering a unique password on a cash register at the store level (hereinafter "punching in" or "punching out," as appropriate); however, if AutoZone becomes aware an hourly employee worked while not punched in, AutoZone pays the hourly employee for time engaged in such work. Except as expressly stated herein, AutoZone denies this request.

REQUEST FOR ADMISSION NO. 2: From August 26, 2005 to present, AutoZone's policy for its hourly employees in the State of Oregon has been that the employee clock out of the AutoZone time-keeping system for their meal periods.

RESPONSE: AutoZone incorporates by reference its General Objections as though fully set forth herein. AutoZone further objects to this request on the grounds that it is overbroad as to its temporal scope and accordingly seeks information not relevant to the claims and defenses of the parties and/or not calculated to lead to the discovery of admissible evidence. Plaintiff Migis

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6/9

1 terminated his employment in February 2006. No class has been certified and class certification is
 2 inappropriate. AutoZone further objects on the grounds that the phrases "clock out" and "time-
 3 keeping system" are not defined and are thus vague and ambiguous. Without waiving the foregoing
 4 objections, AutoZone's policy does, and at all relevant times, did require that an hourly employee
 5 punch out for a meal period. Except as expressly stated herein, AutoZone denies this request.

6 **REQUEST FOR ADMISSION NO. 3:** From August 26, 2005 to present, AutoZone's
 7 policy for hourly employees in the State of Oregon has been that those employees not be paid for
 8 any meal period less than 30 minutes.

9 **RESPONSE:** AutoZone incorporates by reference its General Objections as though fully set
 10 forth herein. AutoZone further objects to this request on the grounds that it is overbroad as to its
 11 temporal scope and accordingly seeks information not relevant to the claims and defenses of the
 12 parties and/or not calculated to lead to the discovery of admissible evidence. Plaintiff Migis
 13 terminated his employment in February 2006. No class has been certified and class certification is
 14 inappropriate. Without waiving the foregoing objections, AutoZone's policy is that employees are
 15 paid for all work time, and are not paid for time clocked out on a break. Except as expressly stated
 16 herein, AutoZone denies this request.

17 **REQUEST FOR ADMISSION NO. 4:** The last day Plaintiff Migis worked for AutoZone
 18 in the State of Oregon was February 2, 2006.

19 **RESPONSE:** AutoZone incorporates by reference its General Objections as though fully set
 20 forth herein. Without waiving the foregoing objections, AutoZone admits that Plaintiff Migis last
 21 punched in and punched out on February 2, 2006. See Response to Request No. 1, herein, for
 22 definition of "punching in" and "punching out". Except as expressly stated herein, AutoZone denies
 23 the request.
 24
 25
 26

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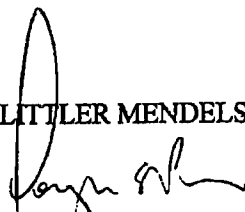
8/9

- 1 (2) The document designated as Exhibit B appears to be a copy of an AutoZone
 2 business record. AutoZone does not know the immediate source of this document.
 3 (3) The document designated as Exhibit C appears to be a copy of document AutoZone
 4 business record produced by AutoZone in this litigation.

5 Except as expressly stated herein, AutoZone denies this request.

6
 7 Dated: April 14, 2008
 8
 9

10 LITTLER MENDELSON, P.C.

11 
 12 Douglas S. Parker, OSB No. 821017
 13 dparker@littler.com
 14 Neil N. Olsen, OSB No. 053378
 15 nolsen@littler.com

16 Of Attorneys for Defendant
 17 AutoZone, Inc.
 18
 19
 20
 21
 22
 23
 24
 25
 26

Page 7 – DEFENDANT'S RESPONSE TO PLAINTIFF'S SECOND
 REQUESTS FOR ADMISSIONS

Littler Mendelson, PC
 1750 SW Harbor Way, Suite 450
 Portland, OR 97201
 Phone: 503-221-0309 Fax: 503-242-2457

EXHIBIT

Page

C
4-4

P 008

Exhibit D

Re: Migis v. AutoZone

Page 1 of 4

Chey Powelson

From: Chey Powelson
Sent: Friday, May 16, 2008 9:25 AM
To: 'Tift, Leigh Ann C.'
Cc: Alpern, Amy R.; Bud Bailey; Brad Griffin; Charity Shindle
Subject: RE: Migis v. AutoZone
Follow Up Flag: Follow up
Flag Status: Red

For purposes of streamlining the conference regarding your issues, I've reviewed the First Amended 39C(6) Notice of deposition set for May 30. That Notice includes several issues that Mark Dessem, even individually, did not speak to and could not have addressed in his 2005 deposition because, for example, the issues noticed include Defendant's document production in this case, Mr. Migis's termination, and other matters occurring in the period of time after August 2005.

From: Tift, Leigh Ann C. [mailto:LTift@littler.com]
Sent: Friday, May 16, 2008 8:25 AM
To: Chey Powelson
Cc: Alpern, Amy R.
Subject: RE: Migis v. AutoZone

The question I asked was whether you would consider a video deposition or stipulating to the testimony of Mr. Dessem. I don't think you answered either question, so let's be sure to address that in the 11:30 conference.

From: Chey Powelson [mailto:cpowelson@wagelawyer.com]
Sent: Thursday, May 15, 2008 7:20 PM
To: Alpern, Amy R.; Tift, Leigh Ann C.
Cc: Bud Bailey; Brad Griffin; Dana Pinney; Charity Shindle
Subject: RE: Migis v. AutoZone
Importance: High

Ms. Alpern:

I'll let you know when I hear from Bud, whether 11:30 tomorrow will work. Even if he is not available, I will still call to confer. In the meantime, and although I believe I recently sent Defendant via letter various case law regarding Plaintiff's understanding of the ORCP 39C(6) process (based on the Federal Fed.R.Civ.Pro. 30(b)(6)), in anticipation of our conference please consider the additional following ideas and cases which further support such understanding, and by which Plaintiff contends that Defendant failed to adequately produce one or more persons to testify on behalf of AutoZone.

Rule 30(b)(6) "streamlines the discovery process" to prevent a corporation from "bandying" or "sandbagging" the deposing party. *Black Horse Lane Assoc., L.P. v. Dow Chem. Corp.*, 228 F.3d 275, 303, 304 (3rd Cir. 2000). "[I]f a Rule 30(b)(6) witness is unable to give useful information he is no more present for the deposition than would be a deponent who physically appears...but sleeps through it." *Id.* Accord, *Resolution Trust Corp. v. Southern Union Co.*, 985 F.2d 196, 197 (5th Cir. 1993).

See also *Casper v. Esteb Enters.*, 119 Wn. App. 759 (2004); *Flower v. T.R.A. Indus., Inc.*, 127 Wn. App. 13 (2005); *Bridgell v. St. Gobain Abrasives Inc.*, 233 F.R.D. 57 (D.Mass. 2005); *Starlight Int'l, Inc. v. Herlihy*, 186 F.R.D. 626 (D.Kan. 1999); *U.S. v. Taylor*, 166 F.R.D. 356 (M.D.N.C. 1996), *aff'd*, 166 F.R.D. 367 (M.D.N.C. 1996); *Ferko v. NASCAR*, 218 F.R.D. 125, 143 (E.D.Tx. 2003); *King v. Pratt & Whitney*, 161 F.R.D. 475

EXHIBIT **D**Page **1-4**

5/30/2008

Re: Migis v. AutoZone

Page 2 of 4

(S.D.Fla. 1995) *aff'd*, 213 F.3d 646 (11th Cir. 2000); *Concerned Citizens v. Belle Haven Club*, 223 F.R.D. 39 (D.Conn. 2004); *Dravo Corp. v. Liberty Mut. Ins. Co.*, 164 F.R.D. 70 (D.Neb. 1996); *United States v. Taylor*, 166 F.R.D. 356 (M.D.N.C. 1996); *Buycks-Roberson v. Citibank Fed. Savings Bank*, 162 F.R.D. 338, 343 (N.D.Ill. 1995); *Calzaturificio S.C.A.R.P.A., s.p.a. v. Fabiano Shoe Co.*, 201 F.R.D. 33 (D.Mass. 2001); *Bank of New York v. Meridien Biao Bank Tanzania, Ltd.*, 171 F.R.D. 135 (S.D.N.Y. 1997) (deponent must be prepared "to the extent matters are reasonably available, whether from documents, past employees, or other sources."); *Overseas Private Investment Corp. v. Mandelbaum*, 185 F.R.D. 67 (D.D.C. 1999); and *Bregman v. District of Columbia*, 182 F.R.D. 352 (D.D.C. 1998).

Please also keep in mind that ORCP 46A provides that an evasive or incomplete answer constitutes a failure to answer. See also ORCP 46D, the case law cited in my May 12 letter to Defendant, as well as: *In re Vitamins Antitrust Litig.*, 216 F.R.D. 168, 174 (D.D.C. 2003); *Reilly v. Natwest Markets Group, Inc.*, 181 F.3d 253, 268 (2nd Cir. 1999) (citing *Commodity Futures Trading Comm'n v. Noble Metals Int'l, Inc.*, 67 F.3d 766, 770-71 (9th Cir. 1995)); and *Haraway v. NASCAR*, 213 F.R.D. 161, 165 (D.Del. 2003) (citing *Black Horse Lane Assoc., L.P.* at 301-02).

See also: *Sec. Ins. Co. v. Trustmark Ins. Co.*, 218 FRD 29 (D.Conn. 2003) (In light of affirmative duty imposed by Fed. R. Civ. P. 30(b)(6), corporate representative was obliged to gain some understanding of underlying facts, regardless of source identifying underlying facts, and to answer questions accordingly; therefore, court granted defendant's Fed. R. Civ. P. 37 motion to compel and required company to identify documents relied on by its 30(b)(6) witness and produce such documents to extent it had not done so already, as attorney-client privilege did not provide valid basis on which to refuse to divulge facts underlying company's response to defendant's allegations.)

In sum, Plaintiff's position is that, in light of the foregoing authorities and the scope of ORCP 36B to discover the facts upon which a party bases its claims or defenses (see the Oregon Court's of Appeals Asato opinion (as cited to Defendant in my April 17 and 18 letters), wherein the Court of Appeals upheld Mult. Co. Judge Christopher Marshall's sanction of a party with dismissal because it failed to provide discovery into affirmative defenses as ordered), today's ORCP 39C(6) deposition did not turn out as it should have.

Also, Ms. Tift, though I committed to getting back to you tomorrow on your requests regarding the May 30 ORCP 39C(6) Notice: (1) Whether Plaintiff will change the location or agree to video conferencing, and (2) Whether Plaintiff will stipulate to the testimony already given by Mark Dessem in 2005 in the Joarnt v. AutoZone case, be advised I double-checked the notice of deposition that went to AutoZone, and it appears Plaintiff noticed Mr. Dessem individually – AutoZone did not produce him as an ORCP 39C(6) designee, nor, I believe, as a "person most knowledgeable."

As I explained on the phone today, even if he was produced in response to a "person most knowledgeable" notice of deposition (which in the Joarnt matter only appear to be related to Defendant's document preservation efforts), that type of notice is different than an ORCP 39C(6) notice. The latter is a deposition of the corporation which has, hopefully, adequately prepared one or more designees to testify on its behalf on the issues set forth in the notice.

I also mentioned to you on the phone that, with respect to the issue of Plaintiff's possible stipulation to prior deposition testimony of Mr. Dessem, Plaintiff had already attempted through a Second Set of Requests For Admission to determine whether certain aspects of AutoZone's payroll policies/procedures/practices had been the same since, inter alia, after Mr. Dessem's August 2005 deposition.

Unfortunately, AutoZone side-stepped the Requests For Admission (Nos. 1 – 3) by interposing what look to be interrogatory answers combined with denials. These types of denials create more work for everyone, as was evidenced in today's ORCP 39C(6) deposition.

Also as a result of today's deposition, based on Defendant's objections and the designee's answers of "I don't know" and indication he would need to look at additional documents/information not before him, it appears that

EXHIBIT DPage 2-4

5/30/2008

Re: Migis v. AutoZone

Page 3 of 4

AutoZone should immediately produce additional documents and information in response to the two Court Orders at issue. This does undercut Defendant's assertion on the record that all documents have been produced in response to the Court Orders. (NOTE: As stated in a previous letter to Defendant, there are still approximately 96 +/- "Termination Reports" that AutoZone has not yet produced because it represented it cannot find them. I informed Ms. Tift in a telephonic conference last week (Friday, perhaps) that Plaintiff's supplemental briefing re: Plaintiff's Motion to Enforce Court Order will have to address the implications of such non-production. As you know, Plaintiff cannot simply wait for responsive documents to appear. We previously proposed to the Court a filing date for class certification of mid-August, but non-production and non-answers have made such a deadline rather untenable.).

So either (1) AutoZone has produced all documents/information and today's designee was simply not prepared to testify as to the content/sources of information of Bates Nos. AZ/MIGIS 0001212 – 1215 and the meaning of the PeopleSoft termination/action codes (I believe at one point he said that he would have to look at additional documents because he could not tell from the (a) summary report, (b) Paycheck Data, and (c) Termination Report whether an employee who quit with 2 weeks' notice was actually his final paycheck timely. Bear in mind that Defendant represented to the Court on April 22 that it needed more time to produce the Termination Reports because that information would show why the apparent late pays on the summary report were not really late at all), or (2) Defendant has not produced all responsive documents that would have allowed today's corporate designee to testify.

Finally, we will need to discuss whether Defendant is available June 30 and July 2.

Chey Powelson

From: Alpern, Amy R. [mailto:AAIpern@littler.com]
Sent: Thursday, May 15, 2008 5:33 PM
To: Chey Powelson
Subject: Re: Migis v. AutoZone

Chey,
 Please call me at 11:30 tomorrow. Please have Bud Bailey on the line and I will include Leigh Ann. I'd like to get this case on a productive track and would like all players to participate. If Bud is not available, please let me know when he is available.
 Best regards,
 Amy

----- Original Message -----

From: Chey Powelson <cpowelson@wagelawyer.com>
To: Alpern, Amy R.
Cc: Tift, Leigh Ann C.; Brad Griffin <bgriffin@wagelawyer.com>; Bud Bailey <bbailey@wagelawyer.com>; Charity Shindle <charity@wagelawyer.com>
Sent: Thu May 15 17:03:36 2008
Subject: Migis v. AutoZone

Ms. Alpern:

Please call me by the end of the day tomorrow to confer on the ORCP 39C(6) deposition that occurred today. I already tried to confer with Ms. Tift, but she was unable to.

Thank you in advance.

Chey K. Powelson

EXHIBIT 

Page 3-4

5/30/2008

Re: Migis v. AutoZone

Page 4 of 4

Attorney at Law

Bailey, Pinney & Assoc., LLC

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Page 4-4

5/30/2008

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

MICHAEL MIGIS, individually, and on
behalf of all other persons similarly
situated,,
Plaintiff,

vs.

AUTOZONE INC., a Nevada
Corporation,,
Defendant.

No. 0711-13531

**DEFENDANT'S OBJECTIONS TO
PLAINTIFF'S SECOND MOTION TO
COMPEL AND MEMORANDUM IN
SUPPORT THEREOF**

NOTED FOR: JULY 11, 2008

I. INTRODUCTION

Plaintiff filed this action in November, 2007. Since that time, Plaintiff has served four separate sets of discovery requests. In response, AutoZone has produced more than 2200 pages, and have reviewed countless more, and has agreed to produce all time records for every employee in a one year period of time. Moreover, AutoZone's counsel met with Plaintiff's counsel and has been a party to at least a dozen "conferences" with Plaintiff's counsel to discuss discovery matters.

This motion follows one such conference, and was filed even though Plaintiff's counsel had been told that AutoZone would review the demands made in a conference on May 15, and would attempt to comply with them. Counsel stated that he intended to file the motion anyway, and remarked that he would "no doubt be thrown under the bus" because he filed the motion without waiting for the promised results of the discovery conferences. This motion should be dismissed by the Court for the reasons set forth in *Anderson v. State Farm Mut. Auto Ins. Co.*, 217 Or. 592, 177 P.3d 31 (2008). That is, Plaintiff's counsel must, in accordance with Oregon law, engage in a

1 meaningful discovery conference with an eye to resolving discovery disputes, not simply opening
2 the floodgates to multiple, unnecessary discovery motions.¹

3 **II. LEGAL STANDARD**

4 The scope of discovery in Oregon courts is limited to legal relevance—that is, the
5 information sought must be relevant to the claim asserted by the party. *See*, ORCP 36B. Moreover,
6 the court has the authority to deny discovery, if justice requires, “to protect a party or person from
7 annoyance, embarrassment, oppression, or undue burden or expense * * *.” ORCP 36C. Finally,
8 and as noted above, the Court should not even consider a motion where the moving party has not
9 complied with UTCR 5.010 in a meaningful way.

10 It is not entirely clear from Plaintiff’s motion exactly what the complaint is in regard to
11 discovery. However, as best AutoZone can tell, the motion relates to two Requests for Production
12 from two different sets of Requests for Production.²

13 **A. RFP No. 6, Plaintiff’s Second Requests for Production to AutoZone.**

14 RFP No. 6 seeks “documents and reports reflecting weekly summarization of hours worked
15 by Plaintiff” for a period of time beginning three years from the date this complaint was filed. The
16 complaint was filed in November, 2007, but Plaintiff Migis quit AutoZone on or around February
17 10, 2006. Therefore, in response to this Request, AutoZone provided more than 150 pages of time
18 records for Mr. Migis, back through 2004. Examples of the documents AutoZone produced are
19 attached as Exhibit 1 to the Declaration of Tift. AutoZone also produced Mr. Migis’ weekly
20 earnings records. *See*, Exhibit 2 to Declaration of Tift, as an example, and also Ms. Alpern’s letter
21 to Plaintiff, attached as Exhibit 3 to Declaration of Tift. To date, it is not clear why these records are
22 seen by counsel as anything other than exactly what was requested. They show when Migis clocked
23

24 ¹ Plaintiff did not need to file the Second Motion to Compel on May 23, because the hearing date is July 11 (Defendant
25 acknowledges that Plaintiff was attempting to note this motion for June 30—despite being told that AutoZone’s counsel
was unavailable on that date—but even then, the motion did not have to be filed May 23).

26 ² Plaintiff does not number RFP’s sequentially. Every set begins with RFP No. 1, which is confusing and difficult to
follow.

1 in and when he clocked out for each day of work in a given work week for the period requested, and
 2 his hours for the week are summarized at the bottom of each page.

3 **B. RFP No. 5, Plaintiff's Third Requests for Production to AutoZone.**

4 RFP No. 5 seeks "all time sheets reflecting the hours each Oregon hourly employee worked
 5 for Defendants...for the period of time from one (1) year prior to the filing of the Complaint through
 6 the date of filing. AutoZone did object to this Request on the grounds it was vague, overbroad,
 7 irrelevant and exceeded the proper scope of reasonable pre-certification discovery.

8 AutoZone's objection is founded on a concern that prior to class certification, counsel does
 9 not represent putative class members, only Mr. Migis. Many employees of AutoZone would no
 10 doubt be distressed to learn that their time records were being disclosed to unknown attorneys.
 11 Further, Mr. Migis' time records stretched to 150 pages—it is clear that producing time records for
 12 every employee in Oregon for a one year period of time would result in tens of thousands of pages.
 13 Courts have repeatedly limited pre-certification discovery in order to prevent overreaching and abuse
 14 in the class action context. *See, Mantolet v. Bolger*, 767 F.2d 1416, 1425 (9th Cir. 1985) [refusing
 15 class-wide discovery where plaintiff failed to show discovery is likely to substantiate class action
 16 allegations]; *D'Anna v. M/A-COM, Inc.*, 903 F. Supp. 889, 894 (D. Md. 1995) ["[a]n employer [in
 17 class context] should not be unduly burdened by a frivolous fishing expedition conducted by plaintiff
 18 at the employer's expense."]; *Shushan v. University of Colo.*, 132 F.R.D. 263, 268 (D. Colo. 1990)
 19 [rejecting "the extraordinary assertion that an aggrieved party can file a complaint, claiming to
 20 represent a class whose preliminary scope is defined by him, and by that act alone obtain a court
 21 order which conditionally determines the parameters of the potential class and requires discovery
 22 concerning the members of that class"]. *See, also, Newman v. Checkrite Cal., Inc.*, 1996 WL
 23 1118092, at *10 (E.D. Cal. 1996) [refusing discovery addressed to the putative class definition; such
 24 discovery was premature since class had not been certified]; *Duval v. Gleason*, 1991 WL 214251
 25 (N.D. Cal. 1991) [refusing pre-certification discovery directed to absent class members where the
 26

1 discovery was “not likely to resolve the issues central to class certification, and would be expensive
2 and intrusive to the class members”].

3 Furthermore, Plaintiff’s counsel repeatedly made suggestions for modifying the scope of this
4 Request only to withdraw the suggestion. For example, in one of the early discovery conferences
5 regarding this RFP, Mr. Powelson first suggested that he would accept a sample of these time
6 records, provided AutoZone would stipulate that the sample was representative. When asked if he
7 would also stipulate (not whether he would stipulate “first”), Plaintiff’s counsel refused. Mr.
8 Powelson next suggested he would accept time records from one of five employees, then changed
9 his mind, then suggested he would accept time records for every one third of AutoZone’s employees,
10 and again changed his mind. *See*, Exhibit G, Declaration of Powelson; Exhibit 3 to Decl. of Tift.
11 Notably, none of these suggestions were originated by AutoZone’s counsel—all of the suggestions
12 came from Mr. Powelson, who, after discussing how the employees would be selected, asking
13 AutoZone to stipulate that the “sample” was representative but declining to do so on the part of
14 Plaintiff, then abandoned the whole idea in favor of a “no compromises” approach. The lengthy
15 discussions about a possible compromise seemed to be spur of the moment ideas which Plaintiff’s
16 counsel had no intention to adopt, and that was frustrating and antithetical to the reason for
17 conducting a discovery conference. Likewise, Plaintiff’s counsel’s “horsetrading” was wholly
18 inappropriate. As even Mr. Powelson concedes, he first offered to back off the discovery demands if
19 counsel would stipulate to class certification (a position that AutoZone’s counsel could not take in
20 good faith in light of the facts of this case nor could it be undertaken consistent with counsel’s
21 professional obligations to AutoZone) or if counsel would stipulate that Migis was an adequate class
22 representative (another stipulation that counsel could not agree to and maintain its professional
23 responsibilities to AutoZone). When neither of those “stipulations” was accepted, Mr. Powelson
24 indicated he was going to file a motion to compel.
25
26

1 Plaintiff's counsel has also failed, in this motion, to explain why the time records of all
2 Oregon employees are relevant to any issue in the case. Certainly daily or weekly time records are
3 not relevant to late pay claims. The Oregon Supreme Court, in *Gafur v. Legacy Good Samaritan*
4 *Hospital*, --P.3d--, 2008 WL 2054448 (Or.), makes clear that Plaintiff is not able to recover money
5 damages for missed or shortened rest breaks, and the Court of Appeals decision in that case settles
6 any claim for wages for missed or shortened lunch breaks. *See*, also, AutoZone's Motion for
7 Judgment on the Pleadings, pending before this Court. Plaintiff Migis has no claim for minimum
8 wage violations—according to him he was always paid more than the Oregon minimum wage.
9 Therefore, it is not immediately apparent what issue in this case all of these time records relate to, or
10 why they are legally relevant.

11 All of that aside, this motion is pointless, because AutoZone has agreed to provide the
12 records. *See*, Exhibit 4, Declaration of Tift.

13 **III. CONCLUSION**

14 AutoZone asks that this Court dismiss this motion in its entirety. Not one of the
15 “conferences” preceding the motion has been for any purpose other than to clear the decks to file a
16 motion to compel. Plaintiff's counsel offers compromises, then withdraws them; uses discovery
17 motions as a club to obtain concessions unrelated to the discovery; and fails and refuses to discuss
18 why the discovery requested is relevant to any issues in the case. Furthermore, as can be seen from
19 the discovery offered to Plaintiff, AutoZone's attempts to produce documents have been in good
20 faith and have been directly responsive to what is requested by Plaintiff—but whatever is produced
21 is merely used as a springboard by Plaintiff to ask for more, or to ask for the same thing but in a
22 different format. This motion is an abuse of the discovery process.

1
2
3 Dated: June 6, 2008
4

5 
6 Leigh Ann Collings Tift OSB No.05473

LITTLER MENDELSON
A Professional Corporation

7 Attorneys for Defendant
8 Autozone Inc.
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CERTIFICATE OF SERVICE

I hereby certify that on June 6, 2008, I served a full, true, and correct copy of the foregoing:

**DEFENDANT'S OBJECTIONS TO PLAINTIFF'S SECOND MOTION TO COMPEL
AND MEMORANDUM IN SUPPORT THEREOF**

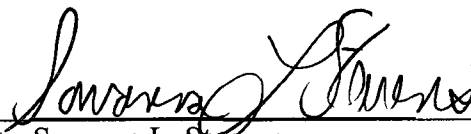
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Of Attorneys for Plaintiff

By


Savanna L. Stevens

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IN REGISTER BY 15

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

MICHAEL MIGIS, individually, and on
behalf of all other persons similarly
situated,

Plaintiff,

vs.

AUTOZONE INC., a Nevada
Corporation,

Defendant.

No. 0711-13531

**DECLARATION OF LEIGH ANN TIFT IN
SUPPORT OF DEFENDANT'S
OPPOSITION TO PLAINTIFF'S MOTION
TO ENFORCE COURT ORDER**

DATED: JULY 11, 2008

I, Leigh Ann Collings Tift, hereby declare as follows:

1. I am an attorney representing Autozone Inc. in the above-captioned matter, and I make this declaration in support of Defendants' Opposition to Plaintiff's Motion to Enforce Court Order. I have personal knowledge of the statements contained herein.

2. Attached as **Exhibit 1** to this Declaration is a true and correct excerpt of Defendant's Fourth Supplemental Responses to Plaintiff's Requests for Admission 1-3 and First Requests for Production.

3. In addition to the summary chart of terminated employees, the documents produced by AutoZone in response to Plaintiff's first Requests for Production were termination reports for employees who terminated in the period November 2006 to November 2007, paycheck data for all employees who terminated between November 2006-2007, and AutoZone's store handbook, a memo

**DEC OF L. TIFT ISO OF DEF'S OPP. TO
PLAINTIFF'S MTN TO ENFORCE
COURT ORDER**

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600 University Street, Suite 3200
Seattle, WA 98101

Phone: 206-623-3300 Fax: 206-447-6965

1 from Mark Dessem, AutoZone's Director of Payroll, a memo from AutoZone's Director of Payroll
2 (who is responsible for all payroll functions) reminding field officers of "our policy to call in all
3 Oregon terminations on a timely basis so that we may issue the appropriate manual check for their
4 final pay," and training materials for managers, which provide, in relevant part, that dismissal of an
5 employee cannot take place on the spot. A copy of a recent letter from Ms. Alpern, outlining the
6 efforts AutoZone has undertaken to respond to Plaintiff's discovery demands and requests for
7 conferences is attached as **Exhibit 2** to this Declaration.

9 4. Attached as **Exhibit 3** to this Declaration is a true and correct excerpt of Excerpt of
10 March 8, 2008 transcript of a hearing before this Court relating to Defendant's production of
11 documents.

12 5. On April 22, 2008, after the Court denied AutoZone's request for an extension of
13 time to produce termination reports, AutoZone made an extraordinary effort to find all termination
14 reports, and did so principally on April 23, 2008, the date ordered by the Court, with the remainder
15 of all documents that could be found on April 24. More than half of the reports cannot be located.
16 However, that is not the result of negligence or a failure to search. AutoZone's store managers, the
17 Regional HR manager, and I have searched period boxes in the stores and all personnel files for each
18 terminated employee. Based upon the testimony of AutoZone's former Regional HR Manager,
19 Nicole McCollum, whose deposition was taken by Plaintiff's counsel in the matter of Joarnt v.
20 AutoZone, it is my understanding that the reports can be printed at the time they are filled out, but
21 not necessarily after the information is sent to AutoZone's corporate records. Attached to this
22 Declaration as **Exhibit 4** is a true and correct excerpt of the deposition transcript of Ms. McCollum,
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1 pages 96 and 97. Plaintiff's Counsel in this matter, Mr. Bailey, was attorney for Plaintiffs Joarnt and
2 Yamaoka, and examined Ms. McCollum.

3 6. Attached as **Exhibit 5** to this Declaration is a true and correct excerpt of the
4 deposition transcript of Plaintiff, Michael Migis, pages 106, 110, 113, 116, and 169.

5 7. Attached as **Exhibit 6** to this Declaration is a true and correct copy of the termination
6 report prepared for Mr. Migis. The document was produced in response to Plaintiff's discovery
7 requests, and is Bates numbered 0001347.

8 8. Attached as **Exhibit 7** to this Declaration is a true and correct copy of a Manager's
9 Training Handbook, page 109. The document was produced in response to Plaintiff's discovery
10 requests, and is Bates numbered 0002177.

11 9. Attached as **Exhibit 8** to this Declaration is a true and correct excerpt of the
12 deposition of Carlos Jon, pages 90, 92 and 103.

13 10. Attached as **Exhibit 9** to this Declaration is a true and correct copy of a termination
14 report, produced in response to Plaintiff's discovery requests. The document is Bates numbered
15 0001819.

16
17
18
19
20
21 Dated: June 5, 2008


Leigh Ann Collings Tift, OSB #05473

ltift@littler.com

LITTLER MENDELSON
A Professional Corporation

Attorneys for Defendant
AUTOZONE, INC.

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DEC OF L. TIFT ISO OF DEF'S OPP. TO
PLAINTIFF'S MTN TO ENFORCE
COURT ORDER

3

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Seattle, WA 98101

Phone: 206-623-3300 Fax: 206-447-6965

EXHIBIT 1

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

MICHAEL MIGIS, individually, and on
behalf of all other persons similarly
situated,,

Plaintiff,

vs.

AUTOZONE INC., a Nevada
Corporation,,

Defendant.

No. 0711-13531

***DEFENDANT'S FOURTH SUPPLEMENTAL
OBJECTIONS AND RESPONSES TO
PLAINTIFF'S FIRST SET OF REQUESTS
FOR PRODUCTION OF DOCUMENTS***

Defendant AutoZone, Inc. ("Defendant") hereby submits its supplemental objections and responses to Plaintiff's First Set of Requests for Production of Documents as follows:

SUPPLEMENTAL GENERAL OBJECTIONS

The following objections apply generally to all of Plaintiff's discovery requests in this lawsuit:

(a) Objections to Scope of Discovery Requests. Defendant objects to all discovery requests to the extent they purport to require any actions not required by the Oregon Rules of Civil Procedure, the Uniform Trial Court Rules, or any local rules. Without limiting the generality of this objection, Defendant objects to all discovery requests to the extent that they (1) go beyond the scope of discovery provided by the Oregon Rules of Civil Procedure, (2) are not reasonably calculated to lead to the discovery of admissible evidence, and/or (3) purport to impose a duty of supplementation greater than that imposed by the Oregon Rules of Civil Procedure.

(b) Privilege and Trial Preparation Materials. Defendant objects to all discovery requests to the extent they call for information or documents that fall within any relevant privilege (including

1 **SPECIFIC OBJECTIONS AND RESPONSES**

2 **REQUEST FOR ADMISSION NO. 1:** Admit that Defendant failed to pay all wages
3 earned and unpaid by the end of the first business day after termination, to at least one involuntarily
4 terminated employee within the 12 months preceding the date of the filing of this lawsuit.

5 **FIRST SUPPLEMENTAL RESPONSE:** Defendant incorporates by reference its General
6 Objections as though fully set forth herein and its specific objections to this request in Defendant's
7 Objections to Plaintiff's First Set of Requests for Production of Documents. Defendant further
8 objects to this request to the extent it is unduly burdensome and overbroad, is not limited to
9 employees who worked in the State of Oregon, seeks information that is beyond scope of proper pre-
10 certification discovery, and seeks information about individuals other than Plaintiff Migis. Plaintiff
11 Migis was not involuntarily terminated. Without waiving its objections, Defendant has not
12 knowingly failed to pay any employee final wages on time, is unaware of any instance where it has
13 done so, and therefore denies this Request on that basis. Defendant further asserts that its policies
14 and procedures intend that employees be paid final wages within the time frames set out in the
15 applicable Oregon statutes.

16 **THIRD SUPPLEMENTAL RESPONSE:** Defendant incorporates by reference its General
17 Objections as though fully set forth herein and specific answer and objections to this RFA as set
18 forth above. Without waiving such objections, see, Response to RFP No. 2.

19 **REQUEST FOR PRODUCTION NO. 1:** If Defendant admits RFA No. 1, produce all
20 documents and electronically stored information for all involuntarily terminated employees to whom
21 Defendant failed to pay all wages earned and unpaid by the end of the first business day after
22 termination, within the referenced time period. Produce documents and electronically stored
23 information in electronic format. If electronic format is not available, produce in original format.
24 This request includes, but is not limited to, Documents and Electronic Data as defined above.

1 **FIRST SUPPLEMENTAL RESPONSE:** Defendant incorporates by reference its General
 2 Objections as though fully set forth herein and its specific objections to this request in Defendant's
 3 Objections to Plaintiff's First Set of Requests for Production of Documents. Defendant further
 4 objects to this request to the extent it unduly burdensome and overbroad, is not limited to employees
 5 who worked in the State of Oregon, seeks information that is beyond class certification issues, and
 6 seeks information about individuals other than Plaintiff Migis. Finally, Defendant objects to the
 7 request for electronically stored information as overbroad and unduly burdensome given that any
 8 need for such information is outweighed by the burden to Defendant of searching its electronic
 9 records. Without waiving its objections, see Answer to RFA 1.

10 **THIRD SUPPLEMENTAL RESPONSE:** Defendant incorporates by reference its General
 11 Objections as though fully set forth herein and its specific answer and objections to this RFP as set
 12 forth above. Without waiving such objections, see, Response to RFP No. 2.

13 **REQUEST FOR PRODUCTION NO. 2:** If Defendant denies RFA No. 1, produce all
 14 documents and electronically stored information for all involuntarily terminated employees within
 15 the referenced time period which Defendant relies upon to support its denial. Produce documents
 16 and records in electronic format. If electronic format is unavailable, produce in original format.
 17 This request includes, but is not limited to, Documents and Electronic Data as defined above.

18 **FIRST SUPPLEMENTAL RESPONSE:** Defendant incorporates by reference its General
 19 Objections as though fully set forth herein and its specific objections to this request in Defendant's
 20 Objections to Plaintiff's First Set of Requests for Production of Documents. Defendant further
 21 objects to this request to the extent it unduly burdensome and overbroad, is not limited to employees
 22 who worked in the State of Oregon, seeks information beyond the proper scope of pre-certification
 23 discovery, and seeks information about individuals other than Plaintiff Migis. Defendant also
 24 objects to the request for electronically stored information as overbroad and unduly burdensome
 25
 26

1 given that any need for such information is outweighed by the burden to Defendant of searching its
2 electronic records.

3 **SECOND SUPPLEMENTAL RESPONSE:** With respect to Plaintiff Migis, Defendant
4 maintains that Plaintiff has all relevant documents; to wit, Plaintiff's final paycheck and Plaintiff's
5 personnel file reflecting the date his employment ended with AutoZone.

6 **THIRD SUPPLEMENTAL RESPONSE:** Defendant incorporates by reference its General
7 Objections as though fully set forth herein and its specific answer and objections to this RFP as set
8 forth above. Without waiving such objections, *see*, documents previously produced to Plaintiff (i.e.,
9 those labeled AZ/Migis 000001-0001655), documents attached hereto, labeled AZ/Migis 0001656-
10 0001863, and electronic information provided on disk, labeled AZ/Migis 3rd Supplemental.

11 **FOURTH SUPPLEMENTAL RESPONSE:** Defendant incorporates by reference its
12 General Objections as though fully set forth herein and its specific answer and objections to this RFP
13 as set forth above. Without waiving such objections, *see*, AZ/Migis 001864-0001881.

14 **REQUEST FOR ADMISSION NO. 2:** Admit that Defendant failed to immediately pay
15 all wages earned and unpaid to at least one employee who gave not less than 48 hours' notice of their
16 intention to quit, within the 12 months preceding the date of the filing of this lawsuit.

17 **FIRST SUPPLEMENTAL RESPONSE:** Defendant incorporates by reference its General
18 Objections as though fully set forth herein and its specific objections to this request in Defendant's
19 Objections to Plaintiff's First Set of Requests for Production of Documents. Defendant further
20 objects to this request to the extent it unduly burdensome and overbroad, is not limited to employees
21 who worked in the State of Oregon, seeks information that is beyond the proper scope of pre-
22 certification discovery, and seeks information about individuals other than Plaintiff Migis. Without
23 waiving its objections and limiting its response to Plaintiff Migis, Defendant has not knowingly
24 failed to pay any employee final wages on time, is unaware of any instance where it has done so, and
25 therefore denies this Request on that basis. Defendant further asserts that its policies and procedure
26

1 intend that employees be paid final wages within the time frames set out in the applicable Oregon
2 statutes.

3 **THIRD SUPPLEMENTAL RESPONSE:** Defendant incorporates by reference its General
4 Objections as though fully set forth herein and specific answer and objections to this RFA as set
5 forth above. Without waiving such objections, see, Response to RFP No. 2.

6
7 **REQUEST FOR PRODUCTION NO. 3:** If Defendant admits RFA No. 2, produce all
8 documents and electronically stored information for all employees who gave not less than 48 hours'
9 notice of their intention to quit, to whom Defendant failed to pay all wages earned and unpaid
10 immediately at the time of quitting, within the referenced time period. Produce documents and
11 electronically stored information in electronic format. If electronic format is unavailable, produce in
12 original format. This request includes, but is not limited to, Documents and Electronic Data as
13 defined above.

14 **FIRST SUPPLEMENTAL RESPONSE:** Defendant incorporates by reference its General
15 Objections as though fully set forth herein and its specific objections to this request in Defendant's
16 Objections to Plaintiff's First Set of Requests for Production of Documents. Defendant further
17 objects to this request to the extent it unduly burdensome and overbroad, is not limited to employees
18 who worked in the State of Oregon, seeks information that is beyond class certification issues, and
19 seeks information about individuals other than Plaintiff Migis. Defendant also objects to the request
20 for electronically stored information as overbroad and unduly burdensome given that any need for
21 such information is outweighed by the burden to Defendant of searching its electronic records.
22 Without waiving its objections and limiting its response to Plaintiff Migis, *see* Answer to RFA 2.

23 **SECOND SUPPLEMENTAL RESPONSE:** With respect to Plaintiff Migis, Defendant
24 maintains that Plaintiff has all relevant documents; to wit, Plaintiff's final paycheck and Plaintiff's
25 personnel file reflecting the date his employment ended with AutoZone.
26

EXHIBIT 2

LITTLER MENDELSON®
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June 3, 2008

Amy R. Alpern
Direct: 503.889.8878
Direct Fax: 503.914.1816
aalpern@littler.com

VIA MAIL AND FACSIMILE 360-567-3331 AND U.S. MAIL

Chey Powelson
Bailey Pinney & Associates, LLC
1498 SE Tech Center Place, Suite 290
Vancouver, WA 98683

Re: Migis v. AutoZone, Inc.
Multnomah County Circuit Court Case No. 0711-13531

Dear Chey:

This follows up on my May 23, 2008 letter to you in which I outlined what we were willing to do to resolve the outstanding discovery issues. In that letter I told you that I would get back to you by June 3, and I am now doing so. For reasons that cause me great concern, you continued to file motions to compel, and to ask for yet additional documents, while we are diligently working to produce those items outlined in my May 23 letter. Indeed, I do believe at this point that you are intentionally making things more difficult than they need to be. For example, I prepared a protective order and asked that you sign it. (I told you that the form of protective order I prepared had been approved by the Multnomah County Presiding Court.) Rather than signing my order, you sent me a different order and required that we submit that order, instead. I did not want to fight about the issue, so I agreed to sign your proposed order and then brought it to the scheduling conference to ask the Court to sign it per our discussion on May 23. When I asked you to sign the order at that scheduling conference, you said you could not do so because you prepared it for Mr. Bailey's signature. I then asked Mr. Bailey, who was also at the scheduling conference, to sign it. He said he could not do so because he had not read it. When I pointed out to him that it was on your firm's letterhead, and urged him to sign it, he finally agreed to do so. However, when I presented it to Judge Maurer at the scheduling conference, she had concerns about the language in the order and asked her assistant to review it. As it now stands, we do not have a signed protective order.

I have now enclosed another protective order that complies with the Multnomah County rules. I signed it, ask that you do so, and ask that you forward it to the Presiding Court.

Moving on to my May 23, 2008 letter, I respond as follows:

1. We agreed to allow you to depose Mark Dessem as a corporate representative pursuant to ORCP 39(c)(6) even though you have already taken ope 39(c)(6)

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Chey Powelson
June 3, 2008
Page 2

deposition. We believe that Mr. Dessem is likely to be able to address some of the issues set forth in the 39(c)(6) notice that took place on May 15, 2008.

I also told you at the May 15 deposition that we would provide you with additional information regarding the total number of full- and part-time hourly AutoZone employees for the time periods set forth in your notice. We reviewed the W-2s for 2006 and can advise you that AutoZone employed 423 employee in Oregon that year. As you recall, we have already provided you with this information for the year 2007. I am still working on 2004 and 2005 and will respond to that request, although I am told that the information is on the payroll tax reports that were produced to your firm in the Joamt matter. Nonetheless, I will review those reports as well, and get our answer to you promptly.

2. As I suspected, the reference to "attendance calendars" in Mr. Jon's deposition is, in fact, a reference to the variance reports. Since we have already produced the variance reports, we have already satisfied this request.

With respect to Request for Production No. 5 (weekly schedule reports referencing Mr. Migis' work schedule, both approved and unapproved, for three years prior to the filing of the complaint), we have now double-checked the period boxes for the two stores in which Mr. Migis worked in Oregon and can confirm that no additional records responsive to this request exist.

We also agreed to send you a screen print of Mr. Migis' paycheck data. It is enclosed.

3. See my May 23 letter.
4. With respect to the May 9 letter you sent to us regarding the authenticity of documents, I can advise you that defendant will stipulate that each of the listed documents, with one exception, is authentic, i.e., that they are what they purport to be. The exception is AG-Migis 0002214. We do not have a copy of that and I suspect that we may have made a numbering mistake.
5. We promised you that we would produce, in electronic Microsoft Excel format, the lunch variation reports that have been previously produced to you in hard copy. I understand that Leigh Ann Tift FedExed those to you yesterday and that you are in possession of those.
6. Defendant has reconsidered its objection to your request for one year's worth of time records for hourly employees in the State of Oregon, but have two caveats. Defendant will seek to shift the cost of producing these records to plaintiff if we are

Chey Powelson
June 3, 2008
Page 3

able to establish that they are not relevant, and/or if the class is not certified. Second, we are agreeing to produce the documents pursuant to the terms of a mutually agreeable protective order. With that understanding, defendant will produce electronic records of time worked for each AutoZone employee from November 2006 to November 2007. Please let me know when you have signed the order and have forwarded it to the Court, and we will produce the documents.

7. See my May 23 letter.
8. Defendant has located and is willing to produce reports, reflecting weekly summarizations of hours worked by AutoZone employees as requested in Plaintiff's Third Request for Production No. 4. Defendant is willing to produce this information pursuant to the terms of a protective order. Please let me know when you have signed that order and forwarded it to the Court, and we will provide you with the requested documents.
9. As promised, defendant's store managers are making a second attempt at finding termination reports. We have looked at the personnel files of all employees to assure that no termination reports were missed, and the AutoZone's Store Managers have been asked to complete their review by June 5. I will let you know what, if anything, they are able to locate. Given Ms. Tift's experience in reviewing the period boxes for the last two stores in which Mr. Migis worked, I strongly doubt that we will find additional responsive documents. Nonetheless, we have taken the time consuming step of looking a second time.

Please understand that your discovery requests have been extremely cumbersome, that we have spent the last month telling you that we want to work cooperatively on discovery issues. As you can see, we have offered several concessions. Despite that, you continue to file motions to compel and motions for sanctions. At some point, I do hope that we are able to move this case in a direction that is likely to benefit our respective clients. That is what you want, right?

Very truly yours,

LITTLER MENDELSON


Amy R. Alpern

ARA/jrs
Enclosures

EXHIBIT 3

Page 1

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

MICHAEL MIGIS, individually,)
and on behalf of all others)
similarly situated,)
Plaintiff,)
vs.) Case No. 0711-13531
AUTOZONE INC., A Nevada)
corporation,)
Defendants.)

BE IT REMEMBERED THAT on the 8th day of
April, 2008, the above-entitled matter came on for
hearing before the HONORABLE JEROME LaBARRE, Circuit
Court Judge.

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Page 7

1 involuntary terminations. Those are the people who have
2 been fired.

3 And the yellow ones, coded A-1, are
4 essentially those who quit with notice. And these are
5 responsive to the Request for Production having to do
6 with the admissions.

7 What we asked for and what you ordered is,
8 that in the denial of the admissions, that they produce
9 the documents that they relied on to make the denials.
10 And in this instance if you look at just the very first
11 line item, obviously this is a compilation. Somebody
12 has taken some documents from somewhere and made a
13 spreadsheet. I believe there's underlying documents
14 that go to this compilation.

15 But if you look at the ID that's apparently
16 an employee number, and we go straight across, the last
17 day I would interpret that the employee worked was
18 August 27th, '07. The check cycle was an off-cycle
19 check or not. The N/Y, we assume, is no or yes. So
20 there was a regular check cut.

21 The check date, or the date the check was
22 likely cut would have been September 14th of 2007. The
23 individual had been fired. Our request was admit that
24 you have people that didn't get their check on the next
25 business day after they were fired.

1 would be a lot of production of documents. And it would
2 go well beyond this.

3 Now, your interpretation -- I think it
4 could be argued that your interpretation is way overly
5 narrow on what is called for in that request. However,
6 it is true it may have been poor drafting by the
7 plaintiff's counsel. I want to essentially introduce as
8 a subject notion of all documents that you relied on in
9 support of your denial, that plaintiff may have -- may
10 be hoist by their own petard on that.

11 I guess I don't know if I have to decide
12 that question today. Maybe I can. Right this second I
13 see arguments both ways. But I do know that employment
14 litigation involves production of -- there's been a lot
15 of employment litigation over the last 10, 20 years.
16 And the production by the employer is never so narrow as
17 to be this kind of a spreadsheet.

18 And if the spreadsheet is supplied, then it
19 always -- the relevant underlying documents that are
20 important for both sides in terms of developing the
21 facts in the case, those are always supplied. So it
22 seems like it's going to have a pretty good argument
23 that there's game playing involved here, and that they
24 ought to get sanctions at some point.

25 And I don't -- I am on a special assignment

EXHIBIT 4

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

RICHARD JOARNT AND BERT YAMAOKO,
individually, and on behalf of
all others similarly situated,
Plaintiffs,

vs.

No. 0503-02795

AUTOZONE, INC., a Foreign
Corporation,

Defendant.

Deposition of
NICOLE LYNN MCCOLLUM
Tuesday, October 25, 2005

Reported by:

SHARON CABELLO, RPR

CSR No. 3080

Job No. 632367

Esquire Deposition Services
949.440.7000

439ec2e4-d805-438b-9774-766d0c5edf5b

Page 86	Page 88
<p>1 particular on a pay stub. 2 Q. Okay, thank you. 3 Who has the authority to terminate an employee 4 as Autozone? 5 A. Operations, management -- Operations 6 management. 7 Q. Can a Store Manager terminate an employee at 8 Autozone? 9 A. Yes. 10 Q. Do they have a procedure or any kind of 11 authority that they have to get before they can make 12 that termination? 13 A. Yes, standard chain of command, including 14 myself, that is needed. And if we are going to be 15 terminating we also get a verbal recommendation from 16 Autozone Relations. 17 Q. Okay. If an individual Store Manager has an 18 employee that for whatever reason believes he wants to 19 terminate, what steps does he have to take to be able 20 to do that? Can you just -- today the employee walks 21 through the door, he has had it, he is 15 minutes late 22 again, and he decides to terminate them on his own. 23 A. Could they? 24 Q. Could the manager do that? 25 A. Could they do it? It's not a policy, I mean,</p>	<p>1 A. Like termination they could. Our process 2 would be they discuss it with their District Manager 3 for the pay reason. 4 Q. Is there a -- if you know, is there a set 5 number of employees that a particular store can't have 6 on its payroll? 7 A. It doesn't work that way. 8 Q. Okay. How does -- 9 A. There is no minimum/maximum for that reason. 10 When -- staffing in stores is dependent on volume. 11 That would be more a District Manager function than 12 myself. Or the schedule versus -- our practice is a 13 70/30 mix, 70 percent full-time, 30 percent part-time. 14 It's a guide we use in the store for coverage. It's 15 flexible. You could have an abundance of part-time 16 people with very limited schedules, i.e. only working 17 two nights or only working weekends and, therefore, 18 inflate the number of employees versus another store of 19 similar volume that is a strict 70/30 mix. 20 Q. Okay. And the actual sales volume of the 21 store dictates the number of employees that would 22 typically be allocated for a particular store? 23 MS. TIFT: Object to the form of the question, 24 misstates and mischaracterizes her testimony. 25 THE WITNESS: Nothing dictates the number of</p>
Page 87	Page 89
<p>1 they could -- the manager can terminate someone in the 2 system, that's their authority to do so. Our process 3 is they would follow the chain of command, being 4 discussing the situation with their District Manager; 5 District Manager would partner with myself, typically I 6 would partner with Autozone Relations for a verbal 7 recommendation. 8 Q. So it kind of goes up the order and then you 9 get a recommendation from Autozone Relations, and then 10 what happens? 11 A. If it's the recommendation we agree with, we 12 would -- the Store Manager would then execute that 13 recommendation and termination. 14 Q. So you get the recommendation yourself and 15 then pass it on to the District Manager, or does the 16 Autozone folks pass it directly on to the -- 17 A. It comes to myself, sometimes with the 18 District Manager attached, sometimes just to myself, it 19 depends on the person in Autozone Relations. 20 Q. What about filling a position in a store, does 21 the manager have authority to go out and hire an 22 individual? 23 A. Yes. 24 Q. Can you do that without authority from other 25 individuals above you?</p>	<p>1 employees, it dictates the available hours allocated 2 based on store volume. You hire accordingly based on 3 your geographic area, your market. 4 Q. MR. BAILEY: Okay. So when I say dictates the 5 number of employees, the contradiction that I stated 6 there is that it's really the number of hours that the 7 store can utilize employees in; is that correct? 8 A. The number of hours is a guide based on 9 expected volume. 10 Q. Okay. Can a Store Manager on his own decide 11 that he needs an additional 30 hours a week? 12 MS. TIFT: Object to the form of the question, 13 calls for speculation. 14 THE WITNESS: Could he decide that he needs 15 that? Or could he use that? They are two very 16 different questions. 17 He can use anything he wants, they have the 18 power in the store to do so. 19 Q. MR. BAILEY: If a Store Manager is allocated 20 through whatever function 200 hours, and believes that 21 he needs 250, it's up to him -- he has authority to go 22 ahead and hire -- put people on staff to use up the 250 23 hours? 24 MS. TIFT: Object to the form of the question, 25 calls for speculation.</p>

23 (Pages 86 to 89)

Esquire Deposition Services
949.440.7000

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<p style="text-align: right;">Page 94</p> <p>1 A. It depends. It would depend on where it came 2 from. Some reports run by our analysts, like the HR 3 report I mentioned earlier, has numerous tabs. That 4 comes in an email. 5 Sometime she will call it one thing, and 6 sometime another. It's a query that she runs. Other 7 information that I may get along with multiple other 8 Autozone employees may have an Autozone header on it. 9 Q. Okay. So with regard to this Exhibit 9, if 10 this is an Autozone report, there is no way to tell 11 from the document itself, is that correct? 12 A. I have not seen it before, so I don't know, 13 not by just looking at it, no. 14 Q. And there is nothing on here that you can look 15 at that would identify it as an Autozone report? 16 A. Not without taking a guess, no. 17 Q. And the same would be the case of Exhibit 8; 18 is that correct? 19 A. Correct. 20 Q. Looking at Exhibit 9, it identifies -- if you 21 just take the first person, it looks like Alejandro 22 Agala, A-l-e-j-a-n-d-r-o A-g-a-l-a. It shows 23 Department ID 2227, and then it has Sales, Part-Time. 24 And then it says Action TER, I take that to mean 25 terminated, and reason A4, And then an effective date</p>	<p style="text-align: right;">Page 96</p> <p>1 So I would not code it. If you are asking me 2 if I could find out what this meant, I could call and 3 ask someone. 4 Q. Do you have people that work for you? 5 A. Yes. 6 Q. If you terminate someone that works for you, 7 do you have a termination form that you fill out? 8 A. Yes. And it is not like the store's. 9 Q. Does the store have a termination form? 10 A. It's an internal form, it's in the computer. 11 They complete it electronically in the computer. 12 Q. So the form itself exists, it's in the 13 computer? 14 A. Correct. 15 Q. If you want to print that form out it would be 16 in the computer? 17 A. I don't know if it's printable in the way that 18 you are -- we do not have a print screen function. So 19 if you are looking to just print out a blank page of 20 what you see on the screen, I don't know if that's 21 possible. 22 Q. If I -- 23 A. Could you look at it? Yes. 24 Q. Could I print out a copy of what I see on the 25 screen?</p>
<p style="text-align: right;">Page 95</p> <p>1 8/6/2005. 2 Do you understand from what is on here what 3 that is intended to say? 4 A. I could speculate. 5 Q. Do you know what reason A4 means? 6 A. No. 7 MS. TIFT: Object to the form of the question. 8 If you want to provide her the legend that was also 9 supplied with this, she could probably read it for you, 10 Mr. Bailey, this is misleading and unfair. 11 MR. BAILEY: Thank you. 12 Q. --- You don't know what A4 is? 13 A. No. 14 Q. Do you have -- is there a document in Human 15 Resources from which you could draw the information of 16 why a person is terminated? 17 A. Would you clarify that? 18 Q. Sure. When a person is terminated is there a 19 document that is filled out and stored in Human 20 Resources that identifies why a person is terminated? 21 A. All separations are handled at the store level 22 or Operations level of appropriate nature. I do not 23 separate anyone that doesn't work for me, that will be 24 entered into the store SMS system and would be along 25 with other data uploaded to the office in Memphis.</p>	<p style="text-align: right;">Page 97</p> <p>1 MS. TIFT: Object to the form of the question, 2 asked and answered. 3 THE WITNESS: If it's not completed, I don't 4 know that you can. 5 Q. MR. BAILEY: Let's say that we completed the 6 form. 7 A. Yes, you can print that. 8 Q. Alejandro Agala has now been terminated and 9 the form was filled out. It was done on August 6, 10 2005. Can I get a copy of that? 11 A. Yes. At that time, I believe. 12 Q. --- Do you know if that is saved into the 13 computer? 14 A. I don't know. 15 Q. Well, do people have Human Resources files, 16 personnel files? 17 A. Yes. 18 Q. When someone is hired you put their hire 19 information in the file? 20 A. Some of it, yes. 21 Q. For example, you put in the file an 22 application? 23 A. Yes. 24 Q. And you put in the information, their W-4, and 25 that kind of stuff, W-2 Forms?</p>

25 (Pages 94 to 97)

Esquire Deposition Services
949.440.7000

439ec2e4-d805-438b-9774-766d0c5edf6b

EXHIBIT 5

Michael Migis

May 20, 2008

Page 1

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

MICHAEL MIGIS, individually,
and on behalf of all other
persons similarly situated,
Plaintiff,

vs. NO. 0711-13531

AUTOZONE, INC., a Nevada Corporation,
Defendant.

VIDEOTAPED
DEPOSITION OF MICHAEL MIGIS

Taken on Behalf of the Defendant
Tuesday, May 20, 2008

Beovich Walter & Friend

d4bf5154-1ee8-4713-889b-13fc3453a6d5

Michael Migis

May 20, 2008

Page 106

1 sorry. Can -- can I retract that?

2 Q Sure.

3 A The telephone conversation did happen. But it
4 was my first initial conversation with 401K,
5 and it was before I had actually quit AutoZone.

6 Q Okay.

7 A And what I had asked them is, I asked them if I
8 could take out a loan against my 401K. And I
9 had an existing thousand-dollar loan from 2002
10 that I used to get my wife and I up to the
11 Portland area. And because of that outstanding
12 loan, they could not give me a second loan on
13 my 401K.

14 Q Okay. So as best you know, did that happen on
15 the 6th, Monday?

16 A Yes.

17 Q Okay. And then what was the next thing that
18 happened?

19 A I called corporate.

20 Q Okay.

21 A And I asked them -- basically, I had the same
22 conversation with AutoZone corporate. And
23 whoever I talked to told me that the only way
24 that I could access my 401K money was if either
25 I retire or I quit the company. I hung up the

Beovich Walter & Friend

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Michael Migis

May 20, 2008

Page 110

1 Q Okay.

2 A You're talking on-the-clock, get paid
3 on-the-clock.

4 Q Okay. So you're pretty confident that you were
5 not paid for any days after February 4.

6 A February 4th was the last day that I worked for
7 AutoZone.

8 Q Okay.

9 A February 6th was the day that I quit.

10 Q Okay. And you quit by informing your peer,
11 Scott Klein?

12 A He's my equal.

13 Q Right.

14 A Yes. I made an attempt to call Mike Italiano.
15 That was my first attempt.

16 Q Typically, when would you have received the --
17 is there usually a three-week lag between when
18 you work and when you get paid?

19 A Not three weeks.

20 Q Okay.

21 A There's a one-day -- you know, if I -- if I
22 were just to start the company today, I would
23 have to wait one week. They hold one week's
24 pay back. And -- but if payday was next week,
25 then I'd work this week, work the second week,

Beovich Walter & Friend

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Michael Migis

May 20, 2008

Page 113

1 A Exactly.

2 Q And you also got the cash out of your 401K?

3 A No, my 401K was sitting in the bank for a week
4 before I got my last check from AutoZone.

5 Q Okay. Do you recall about how much it was that
6 you received from your 401K?

7 A Well, after 20 percent federal taken out of it,
8 it was approximately \$9,000 -- \$9,000.

9 Q Okay. And then did you get any other checks
10 from AutoZone besides these three, the last
11 paycheck, the stuff from the sale -- of the
12 stock purchase plan and the 401K proceeds?

13 A The 401K proceeds did not come from AutoZone.

14 Q Okay. Right. But beyond those three checks,
15 did you get any other payment from AutoZone or
16 the --

17 A I -- I received one check for the sale of my
18 stocks.

19 Q Right.

20 A And then I -- I want to say three checks, as
21 far as relative to stock.

22 Q Okay. Three checks?

23 A And that -- and that includes balanced. There
24 wasn't enough moneys to buy stocks. This is
25 what was left over, and that was the final

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Michael Migis

May 20, 2008

Page 116

1 And I said, I need you to terminate me out of
2 the system so that corporate can terminate me
3 out of the system so that 401K can be notified
4 I've been terminated so they can release my
5 monies to me.

6 Q Okay. And do you have an idea in your mind
7 about when that conversation happened?

8 A I want to say Tuesday following the Monday that
9 I -- that I left the company. I think Mike
10 Italiano was off that Monday, I -- I think.

11 Q And then the second time you talked to him?

12 A Would have been more towards Friday.

13 Q Okay.

14 A But that was not because I did not try to get
15 ahold of him before that.

16 Q Right.

17 A I tried calling the store, he was not there.
18 It was his day off.

19 Q Okay. And the second --

20 A But --

21 Q Did you ask him if the check was at the store?

22 A I hadn't even been terminated yet.

23 Q Okay.

24 A So there's no way that -- that the check would
25 be at the store at that point in time.

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Michael Migis

May 20, 2008

Page 169

1. that I won't be terminated until sometime
2. later; correct? My intentions --

3 A If --

4 Q -- might not be clear.

5 A If one were to do that, then you would be
6 correct.

7 Q Okay. Did you ever know of any employees who
8 just stopped coming in and then came back and
9 said: Look, I'm really sorry. I just went off
10 with my girlfriend. Or I did whatever, and I'm
11 sorry, and I'd like to be reinstated?

12 A Not -- not the situation that -- that you
13 described, no.

14 Q Anything like that?

15 A I personally have walked off the job from
16 AutoZone, took three days off and came back and
17 assumed the same position with the company.

18 Q Okay.

19 THE VIDEOGRAPHER: Eight minutes.

20 MS. TIFT: Okay.

21 Q BY MS. TIFT: Would you agree with me that hourly
22 employees are personally responsible -- your
23 job -- to clock in correctly at the register?

24 A Yes.

25 Q And if you don't clock in correctly at the

Beovich Walter & Friend

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EXHIBIT 6

AutoZoner Termination Report

*** AutoZone 2236 ***

02/08/2006

09:43:55

Page 1

AutoZoner Emp ID: 10090549

AutoZoner Name: MIGIS, MICHAEL

AutoZoner Address:

AutoZoner City:

AutoZoner State: OR

AutoZoner Zip: 97220

AutoZoner Phone: (503)

Termination Reason: Quit With Notice

Last Day Worked: 02/10/2006

Last Day Paid: 02/10/2006

Would You Rehire?: No

REDACTED

*Comments

MIKE FAILED TO SHOW FOR WORK THE STORE
WAS NOT OPENED ON TIME

WRONG KEY PRESSED SHOULD READ QUIT
WITHOUT NOTICE

Manager Signature: Michael Italiano

Completed By: ITALIANO, MICHAEL

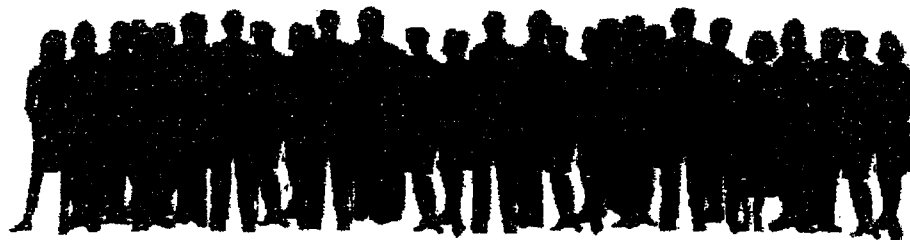
Job Title: Manager

Date: 02/08/2006

AZ/MIGIS 0001347

EXHIBIT 7

Being a Manager



Types of disciplinary action (continued)

Type of Action	Details
Termination	<p>AutoZone is an at will employer. Termination may be a result of unsatisfactory or inefficient job performance or unacceptable personal conduct.</p> <ul style="list-style-type: none"> • Before considering termination of an AutoZoner, <ul style="list-style-type: none"> • the Store Manager should discuss the problem with the DM, RM or RHRM, and • the RHRM should discuss the problem with DHRM/ AutoZoner Relations. • Once an agreement is reached on the need to terminate an AutoZoner, a dismissal conference must be scheduled with the following people duly notified and in attendance, <ul style="list-style-type: none"> • the Manager or other person chosen by AutoZone management to conduct the conference • the AutoZoner, and • if the person conducting the conference chooses, security may also be present. <p>IMPORTANT: No attorney shall represent either side at the conference. The conference attendees will review the reasons for termination and documentation.</p>

Continued On Next Page

EXHIBIT 8

1 Q Under Last Date, what does that identify?

2 A That would be the last date worked.

3 Q That's the last day that an employee
4 performed labor?

5 A That's the last date that the employee had
6 any time in the time clock.

7 Q So this would be the last day an employee
8 worked?

9 A Correct.

10 Q Where there was time recorded for their
11 work?

12 A Right. If they worked the time recorded
13 for that date, that was the date.

14 Q And then on the other side it says Off
15 Cycle. What does that mean?

16 A Off Cycle meaning that we have a period for
17 pay cycles. "Yes" means it was paid during the pay
18 cycle; "no" means it was paid in between pay cycles.

19 Q Let me back up and see if I can understand
20 that. If it says Off Cycle, No, that means they
21 received their check on the next regular payday, or, on a
22 regular payday?

23 A That is correct.

24 Q And if it says Off Cycle, Y, meaning yes,
25 it means the check was prepared, but not at a regular

1 A For net, right.

2 Q When you look at one of these, would there
3 have been a gross pay? If you looked at a screen print
4 when you said this might have been made up of screen
5 prints, would there have been a Gross Pay column?

6 A I don't recall.

7 Q And then over, the next thing is Reason
8 B-3? Do you know what B-3 means?

9 A There is a legend towards the back, and we
10 go to -- B-3 would be page 1218, and B-3 would be almost
11 past halfway. B-3, violation of company policy.

12 Q And over there it says VOL or INVOL in a
13 column across from that where you are looking at B-3 on
14 page 1218?

15 A Yes.

16 Q And it says Involuntary, does that mean
17 someone was fired?

18 A Yes.

19 Q Can you tell me from this particular
20 document, can you tell me what day the employee -- and I
21 am looking at employee 1004509, the first employee
22 listed on this document, can you tell me what day that
23 employee was fired?

24 A No.

25 Q The next one down, which is employee ID

1 A If I would tell the manager to put quit
2 with notice?

3 Q Yes.

4 A Let me think about it. I have never had
5 that question asked. I couldn't tell what the manager
6 would do, but that's what I would tell the manager, quit
7 with notice.

8 Q And from your background in working in
9 Oregon, do you know whether or not managers received any
10 training on when they are to make sure people get paid
11 if someone quits with notice or without notice?

12 A Yes, there's a training manual for that,
13 terms, and they go through the training and they deal
14 with how to process if somebody, quote, unquote -- for
15 example, if somebody gets terminated.

16 And the HR manager will approve the
17 termination, and then will call the Payroll Department.
18 And they will process -- the Payroll Department will cut
19 a check within the guidelines of whatever state we're
20 operating.

21 Q Okay. Were you -- did you have any review
22 of the Request for Admissions that were made to Auto
23 Zone having to do with the production of this particular
24 document? And I am talking about Exhibit No. 3.

25 MS. ALPERN: Are you talking about at the

EXHIBIT 9

AutoZoner Termination Report

*** AutoZone 2203 ***

01/29/2007

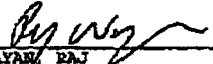
12:45:31

Page 1

AutoZoner Emp ID: 10346896
AutoZoner Name: CADENA, BLADIMIR
AutoZoner Address: 1412 N DEBORAH RD
AutoZoner City: NEWBERG
AutoZoner State: OR
AutoZoner Zip: 97132
AutoZoner Phone: (503) 914-9171
Termination Reason: Abandoned Job *
Last Day Worked: 01/03/2007
Last Day Paid: 01/03/2007
Would You Rehire?: No

*Comments

NO CALL NO SHOW
CALLED LEFT MESSAGE 5 DAYS IN A ROW
NO REPLY
DIDNT RETURN ANY CALLS

Manager Signature: 

Completed By: RARAYAN, RAJ

Job Title: Manager

Date: 01/29/2007

AZ/MIGIS 0001819

CERTIFICATE OF SERVICE

I hereby certify that on June 5th, 2008, I served a full, true, and correct copy of the following document:

**DECLARATION OF LEIGH ANN TIFT IN SUPPORT OF DEFENDANT'S
OPPOSITION TO PLAINTIFF'S MOTION TO ENFORCE COURT ORDER**

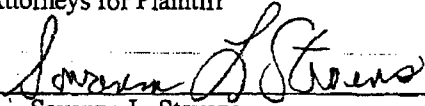
as indicated below:

- ☐ By delivery via messenger, or otherwise by hand,
☒ By facsimile,
☐ By e-mail,
☒ By mailing same, postage paid,

addressed to:

Bailey Pinney & Associates LLC
Attorneys at Law
1498 SE Tech Center Place
Suite 290
Vancouver, WA 98683
Fax (360) 567-3331

Of Attorneys for Plaintiff

By 
Savanna L. Stevens

Firmwide: 85446067.1 013306.2124

DEC OF L. TIFT ISO OF DEF'S OPP. TO
PLAINTIFF'S MTN TO ENFORCE
COURT ORDER

4

Little Mendelson, PC
600 University Street, Suite 3200
Seattle, WA 98101
Phone: 206-623-3300 Fax: 206-447-6965

1
2
3
4
5 **IN THE CIRCUIT COURT OF THE STATE OF OREGON**
6 **FOR THE COUNTY OF MULTNOMAH**

7 **MICHAEL MIGIS**, individually, and on
8 behalf of all others similarly situated,

9 Plaintiff,

10 v.

11 **AUTOZONE, INC.**,

12 Defendant.

Case No. 0711-13531

**PLAINTIFF'S RESPONSE TO
DEFENDANT'S MOTION FOR
PARTIAL JUDGMENT ON THE
PLEADINGS**

Date: **July 11, 2008**

Time: **1:30 p.m.**

Court: **The Hon. Jerome LaBarre**

Rm: **702**

13 The Court should deny Defendant's motion for judgment on the pleadings on
14 Plaintiff's meal period claims. Plaintiff agrees that his rest period claim is no longer viable
15 based on the Oregon Supreme Court's decision in *Gafur v. Legacy Good Samaritan Hosp. &*
16 *Med. Ctr.*, ___ Or ___ (May 15, 2008). Defendant does not properly distinguish between
17 Plaintiff's meal and rest period claims. Rather, Defendant states that both claims must be
18 dismissed because "no private right of action for meal and rest period violations exists."
19 Def's Memo, p. 3. *Legacy* says no such thing.

20 In *Legacy*, the Supreme Court examined the Bureau of Labor & Industries' (BOLI's)
21 administrative rules that applied to rest periods and determined that they do not require
22 employers to pay additional wages in the event of their violation. 2008 Ore Lexis 329 *21.
23 *Legacy* does not hold that an employee cannot ever bring a "private" claim for missed breaks.
24 Neither *Legacy* opinion says what Defendant wanted the Court to say – that a worker cannot
25

1 bring a private lawsuit for violation of administrative rules governing rest or meals breaks.

2 On the contrary, the Supreme Court relied on BOLI's administrative rules to determine that
3 the employees in *Legacy* were not owed any wages.

4 For rest period claims, *Legacy* stands for the proposition that, so long as the employer
5 paid the employee wages for the entire work period, the employee cannot bring a wage claim
6 to collect "additional wages" if the employee did not receive a rest break. By extrapolation, if
7 the employee took a break as allowed by BOLI rule and the employer reduced the employee's
8 pay by the amount of the break, the employee would have a wage claim and, therefore "a
9 private right of action," because the BOLI rule requires that the rest break be paid. Plaintiff
10 agrees, however, that in this case the rest claims are extinguished under *Legacy* because
11 Defendant paid the employees for the entire work period, although the workers did not receive
12 a rest period.¹

13 But *Legacy* does not affect Plaintiff's meal period claims. They are still viable.
14 Defendant attempts to rely on the Court of Appeals' decision in *Legacy*, but that decision is
15 based on Plaintiff's pleadings in that case, which are different than the pleadings here. In
16 *Legacy*, the plaintiff failed to allege that the defendant owed the plaintiff wages for improper
17 deductions. Here, however, Plaintiff alleges that Defendant improperly deducted wages for
18 meal periods. Unlike the complaint in *Legacy*, Plaintiff's complaint pleads a claim for unpaid
19 wages as the result of Defendant's unlawful reduction of his wages for meal periods of less
20 than 30 minutes in length in contravention of former OAR 839-020-0050.

21 Paragraph 32 of Plaintiff's complaint states,

22 " * * * AutoZone failed to pay wages to its employees for meal periods of less than 30
23 minutes in length. As a result, Plaintiff and other similarly situated class members are

24 ¹Plaintiff asked Defendant to agree to allow Plaintiff to amend the complaint to remove
25 the rest period claim, but Defendant did not agree.

26
Page 2 -

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR PARTIAL JUDGMENT ON THE
PLEADINGS

1 entitled to wages for the unprovided meal period violations, for the six-year period
2 before the filing of this class action lawsuit * * *."

3 Similarly, under the class claims, paragraph 39 states:

4 "For Plaintiff and all similarly situated class members who worked for AutoZone in
5 Oregon, within the six-year period before the filing of this complaint, from whom
6 AutoZone deducted wages from the class members' wages for meal periods of less
7 than 30 minutes in length."

8 In other words, Plaintiff's claim is limited to wages that Defendant improperly deducted from
9 Plaintiff's pay – that is, Defendant owes Plaintiff wages where Plaintiff did not receive a 30-
10 minute meal period relieved of all duty, and Defendant deducted wages from Plaintiff's pay.

11 BOLI has long interpreted its administrative rule to require that the employer pay for
12 any meal period that does not allow the employee 30 minutes relieved of all duties. For
13 example, the BOLI website provides FAQ's for employers, including:

14 Q: "What is the nature or circumstances of the work that prevent me from giving my
15 workers an uninterrupted 30-minute meal period?"

16 A: "If, because of the nature or circumstances of the work, an employee is required to
17 remain on duty or perform any task during the meal period, the employer must
18 consider the meal period as hours worked and pay the employee for the period * * *."
19 (Emphasis supplied). www.oregon.gov/BOLI/TA/T_FAQ-Restandmeals.html.

20 This requirement has been reprinted in BOLI's employer handbook for many years, *see e.g.*
21 *Wage and Hour Laws*, Handbook for Oregon Employers, 1996 revised edition, p. 50: "Meal
22 periods must be 30 minutes without interruption to be unpaid time." Administrative decisions
23 by the Commissioner also illustrate BOLI's longstanding requirement that the employer pay
24 for a lunch period that does not meet the regulatory requirement of 30 minutes relieved of all
25 duty. *See, e.g., In the Matter of Judith Wilson*, 5 BOLI 219, 226 (1986) (OAR 839-20-050
26 does not allow an employer to deduct meal periods from an employee's wages when the
employee is not completely relieved from duty).

27 In short, unlike *Legacy*, where the Court found that BOLI's practice and prior
28 interpretations were inconsistent with BOLI's assertion that an employer would owe

1 "additional wages" for missed rest breaks, BOLI's longstanding policy is to require payment
2 for meal periods that are less than 30 minutes or for which the employee is not relieved of all
3 duty. That is what former OAR 839-020-0050 required and that is what the recent
4 amendment to the rule requires.² Neither *Legacy* appellate decision supports Defendant's
5 premise that Plaintiff cannot bring suit for unpaid wages caused by Defendant's failure to
6 properly pay employees for meal breaks.

7
8 **CONCLUSION**

9 The Court should deny Defendant's motion for partial judgment on the pleadings for
10 Plaintiff's meal period claims.

11
12 Dated this 9th day of June, 2008.

13
14 BAILEY, PINNEY & ASSOCIATES, LLC

15 

16
17 A.E. "BUD" BAILEY, OSB 87157

18 CHEY POWELSON, OSB 03551

19 Of Attorneys for Plaintiffs
20
21

22 ²Former OAR 839-020-0050 (1)(a) defines "appropriate meal period" to mean "(A) period
23 of not less than 30 minutes during which the employee is relieved of all duties for each work
24 period of not less than six or more than eight hours. * * *" OAR 839-020-0050 (B) distinguishes
25 an appropriate meal period from "a period in which to eat" as one in which the employee
26 continues "to perform duty" and "which is not deducted from the employee's hours worked."
BOLI recently amended the rule, which now explicitly states, "The employee is paid for any and
all meal periods in which the employee is not completely relieved of all duty." OAR 839-020-
0050 (6) (g).

CERTIFICATE OF SERVICE

I hereby certify that I caused to be served the foregoing **Plaintiff's Response to Defendant's Motion for Partial Judgment on the Pleadings** upon:

Amy Alpern
Littler Mendelson
1750 SW Harbor Way, Suite 450
Portland, OR 97201

by the following indicated method or methods:

☒ by mailing a full, true, and correct copy thereof in a sealed, first-class postage-prepaid envelope, addressed to the person as shown above, the last-known office address of the person, and deposited with the United States Postal Service at Vancouver, Washington on the date set-forth below.

☒ by faxing a full, true, and correct copy thereof to the person at facsimile number 503-914-1816, which is the last-known fax number for the person, on the date set forth below. The receiving fax machine was operating at the time of service and the transmission was properly completed. Attached herewith is the confirmation of receipt which was generated by the transmitting machine.

DATED: June 9, 2008



CHEY POWELSON, OSB 035512
Of Attorneys for Plaintiff

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

MICHAEL MIGIS, individually, and on
behalf of all other persons similarly
situated,,

Plaintiff,

vs.

AUTOZONE INC., a Nevada
Corporation,,

Defendant.

No. 0711-13531

**DEFENDANT'S OPPOSITION TO
PLAINTIFF'S MOTION TO "BIND OR
COMPEL ORCP 39C(6) DEPOSITION
ANSWERS**

DATE: JULY 11, 2008

I. INTRODUCTION

Plaintiff's motion, in essence, asks this court to require a corporation to prepare a corporate representative to testify about legal defenses, such as laches, estoppel, and the technical requirements for class certification under the auspices of ORCP 39C. As was explained to Plaintiff's counsel, there is simply no way to prepare a corporate witness—in this case, a Divisional Human Resources Manager—to testify about legal matters without first educating the witness about the legal definition of these terms. If that is required, and as most courts agree, what happens is that attorneys must disclose work product, and, probably more significantly, a lay person is charged with learning and then explaining legal matters that are a challenge even for licensed attorneys.

AutoZone does not disagree with the basic premises set out by Plaintiff. It is true that a corporation must select a knowledgeable witness in response to a 39C deposition notice, and must prepare the witness to testify about matters identified in the notice. AutoZone did so. However, that duty does not stretch to require that a corporation provide a legal education to a lay witness nor that the corporation's attorneys waive evidentiary privileges, and that is the disagreement here.

1 **II. RELEVANT FACTS**

2 **A. Plaintiff's Two 39C(6) Deposition Notices.**

3 Plaintiff's first 39C(6) deposition notice is attached, in full, as Exhibit 1 to the Declaration of
 4 Tift. Plaintiff's second 39C(6) deposition notice is attached, in full, as Exhibit 2 to the Declaration
 5 of Tift. While Plaintiff's motion conflates the two, a witness, Carlos Jon, was produced in Oregon in
 6 response to the first notice. AutoZone objected to the second notice, in that the witness with
 7 knowledge resides in Tennessee, works in Tennessee, was deposed prior to this time in Tennessee,
 8 would be subject to hardship should he be required to travel from Tennessee for the purpose of a
 9 relatively brief examination, and AutoZone offered less burdensome, less costly alternatives, i.e., a
 10 video deposition and/or stipulating to the witness's prior testimony. Plaintiff's counsel agreed to
 11 move the date for the deposition on topics addressed in the second notice to May 30, while
 12 continuing to argue that the deposition was to take place in Oregon. AutoZone filed a motion for
 13 protective order regarding the second notice prior to the re-scheduled date, and the deposition was
 14 not conducted. Decl. of Tift. Accordingly, this motion to "bind" a witness to his answers given at a
 15 deposition necessarily concerns only the first 39C(6) notice and the subjects addressed by that
 16 notice.

17 **B. The Subjects Addressed by Plaintiff's First 39C(6) Notice.**

18 In summary, the subjects noticed in the first 39C(6) notice were:

- 19 1. All material facts related to Defendant's First Affirmative Defense that Plaintiff failed
 20 to state a claim for class-wide relief and that Plaintiff Migis was an inadequate class representative;
- 21 2. All material facts related to Defendant's Second Affirmative Defense that Plaintiff
 22 was "treated fairly and in good faith" and were paid all monies due and/or believed to be due;
- 23 3. All material facts related to Defendant's Third Affirmative Defense relating to
 24 estoppel;
- 25 4. All material facts related to Defendant's Fourth Affirmative Defense relating to
 26 laches;

1 5. All material facts related to Defendant's Fifth Affirmative Defense relating to a bona
2 fide dispute;

3 6. All material facts related to Defendant's Sixth Affirmative Defense relating to the
4 requirements set forth in ORCP 32 for certification of a class action lawsuit, and (a) the total number
5 and location of AutoZone stores in Oregon; (b) the total number of full and part-time AutoZone
6 employees in Oregon; (c) the total number of AutoZone employees who terminated in the six years
7 preceding the complaint; (d) the total number of AutoZone employees whose "time records show
8 one or more work weeks of more than 40 hours of work" for the six year period preceding the
9 complaint; (e) the total number of AutoZone employees who delivered or picked up parts or other
10 inventory; and (f) all other material facts relating to AutoZone's contention that class certification
11 pursuant to ORCP 32 was not appropriate.

12 7. All material facts related to Defendant's Eighth Affirmative Defense relating to the
13 claim that Plaintiff's claims are barred because there is a prior action pending, i.e., Joarnt v.
14 AutoZone;

15 8. All material facts related to Defendant's denials to Plaintiff's First Requests for
16 Admission;

17 9. "The document(s) Bates-numbered AZ/Migis 0001212-1215 and... 1216-1219,
18 including the identity of all persons involved in the creation, review and/or modification of such
19 documents...";

20 10. "The contents and authenticity of the documents Defendant has produces, as of the
21 date of the deposition, during the course of this lawsuit;"

22 11. "The contends and authenticity of the documents requested below."

23 **C. AutoZone's Response to the First 39C(6) Deposition Notice.**

24 In response to this Notice, on April 21, 2008, nearly one month before the deposition was
25 scheduled, counsel for AutoZone drafted a letter, outlining objections to the Notice. *See*, Exhibit 3,
26

Decl. of Tift. Plaintiff's motion trivializes the concerns set forth by AutoZone (for example, in response to the second category, the *actual* discussion was about what was intended, and it was explained that "we [AutoZone] can designate a payroll person to explain AutoZone's payroll policies, if that is the crux of this inquiry. You [Mr. Powelson] suggested that it would be best to file a motion to make more definite and certain. I think it is incumbent upon Plaintiffs to articulate the topics upon which they wish to examine corporate witnesses. If I do not hear from you with a further explanation, the witness will be prepared to talk about payroll policies." *See*, Exhibit 3.) Notably, Plaintiff's counsel did not ever offer clarification or give any additional specifics that were intended by this inquiry.

On May 8, 2008, counsel for AutoZone again warned that Plaintiff's intention to examine a lay witness about legal matters such as laches was likely outside the scope of a proper 39C deposition. *See*, Exhibit 4, Decl. of Tift. Plaintiff's counsel again professed to differ, declined to take any notice of AutoZone's objections, and indicated the deposition would go forward. Decl. of Tift.

D. Mr. Jon's Deposition.

On May 15, 2008, Carlos Jon, a Divisional Human Resources Manager appeared for his deposition, and was represented by Ms. Alpern, counsel for AutoZone. Plaintiff, in this motion, wholly distorts his testimony.

Topic 1, Failure to State a Claim: Plaintiff complains that Mr. Jon "could not testify as to any facts of which AutoZone was aware that would give rise to its contention that Plaintiff Migis could not obtain relief in this lawsuit for meal breaks." In point of fact, that was not the question asked. The question asked by Mr. Bailey was:

BY MR. BAILEY: I don't want a legal conclusion. I have asked you if you are aware of any facts that would give rise to this statement. In other words, do you understand anything, besides what you have talked about today, that would -- or *have facts that would enhance or tell us why Mr. Migis could not obtain relief in his lawsuit for his allegations in connection with meal breaks?* (emphasis added).

1 See, Jon Tr. at 41:25-42:7.¹ In response to counsel's question, Ms. Alpern explained:

2 MS. ALPERN: Certain of the questions that you have in your notice, to the extent that they
3 are fact based, this witness is prepared to answer. Certain other questions, and I guess 104-A
4 is a good example, "failed to state any claim for which class-wide relief may be granted," I
5 think categorically cannot be answered by a nonlawyer, because I think they require legal
6 knowledge and legal analysis. So we're doing our best to answer factual questions that you
7 put to the witness. And to the extent that the factual part of your question is tied to the legal
8 theory, I think that's where it becomes hard for the witness. ***So you are not asking him
about whether Migis missed meal breaks. You are asking him whether plaintiff failed to
state a claim in which meaningful relief can be made with regard to alleged missed meal
breaks.*** And I think that's where the deponent is having a hard time. I could have sat down
and said to him, these are all of our legal theories and you go regurgitate that in a deposition,
but he couldn't do that without revealing our theory and thought processes and
communications. (emphasis added)

9 See, Jon Tr. at 45:25-46:23. To answer this inquiry, Mr. Jon would have to know the ins and outs,
10 and appellate history of *Gafur v. Legacy Good Samaritan Hosp. and Medical Center*, --P.3d--, 2008
11 WL 2054448 (OR). This inquiry is inappropriate, and could not be answered by a lay person.

12 Topic 2, Good Faith Payment of Wages Due: Plaintiff contends that Mr. Jon "did not know
13 how to answer whether Plaintiff Migis was 'paid or not paid,'" and that therefore Mr. Jon was
14 unprepared to testify concerning AutoZone's Second Affirmative Defense. First, Mr. Jon's
15 testimony in regard to the Affirmative Defense was:

16 A I don't understand the term lawful business reasons, but, yes, we pay according to -- in
17 good faith.

18 Q Tell me what -- when you say Auto Zone pays in good faith, tell me what it is that you
believe AutoZone has done to establish the method in which it makes payments?

19 A Time card is generated, goes to Payroll, paycheck is drawn and paid to the Auto Zoners.
20 If there is discrepancies before submission, or what have you, then the manager needs to
correct it before submitting to Payroll.

21 Jon Tr. at 48:6-16. Beyond this, Mr. Jon was, admittedly, unable to talk about Mr. Migis' pay in
22 specific instances, or whether he missed lunch or rest breaks. As to the first topic, Migis' specific
23 pay records are not addressed in the 39C(6) Notice, and meal and rest break claims are governed by
24 *Gafur*.

25
26 ¹ Excerpts of the Deposition of Carlos Jon are attached as Exhibit 5 to the Declaration of Tift.

1 Topic 3, Estoppel: Plaintiff's counsel, for obvious reasons, never asked Mr. Jon if he could
 2 explain "estoppel." Instead counsel asked Mr. Jon if he could testify about Migis' pay and his
 3 failure to report compensable time, could explain "end of day" tasks performed by Store Managers,
 4 and could address whether employees who were present at the end of the day failed to correctly
 5 report their time. *See*, generally, Jon Tr. at 64-65; 70-71. None of these topics are addressed in the
 6 Deposition Notice. Even if they were, a corporate representative could not testify whether Mr. Migis
 7 reported his time correctly—Migis must do that.

8 Topic 4, Bona Fide Dispute: Questions from counsel to Mr. Jon on this topic are as follows:

9 Q With respect to Mr. Migis and any claims that he made, do you have any understanding
 10 that Auto
 11 Zone believes that there is a good faith dispute between Auto Zone and Mr. Migis over
 12 wages that are owed?

13 A Wages owed to him?

14 Q Yes.

15 A Not in detail.

16 Q If I asked you if you knew if there were some underlying facts that, while not admitting
 17 that wages are owed, but if Auto Zone were to say, if I did owe wages to Mr. Migis, there is a
 18 good faith belief on my part, Auto Zone's part, that I don't owe them. You wouldn't know the
 19 facts surrounding the good faith believe that wages alleged to be owed are not owed, correct?

20 MS. ALPERN: Objection; vague.

21 THE WITNESS: I am not aware.

22 *See*, Jon Tr. at 80:4-20. Once again, without specific instruction from a lawyer, no lay person can
 23 give an explanation for a "good faith" or bona fide dispute sufficient to establish a defense to a wage
 24 claim—yet that is the exact question that was asked of Mr. John. managers, which provide, in
 25 relevant part, that dismissal of an employee cannot take place on the spot. Decl. of Tift; see, also
 26 Exhibit 2 to Decl. of Tift.

Topic 5, Requirements for Class Certification: Plaintiff's motion makes it clear that
 counsel's intent was to question Mr. Jon about every element necessary to establish class

1 certification under ORCP 32. For example, Plaintiff contends that Mr. Jon was an appropriate
 2 witness to discuss “numerosity.” Not only is that incorrect legally, it is practically unnecessary.
 3 Plaintiffs are well aware that there were more than 100 AutoZone employees who terminated
 4 employment, for one reason or another, in the one year period 2006-2007. In fact, AutoZone’s
 5 summary report that details all of those terminations is the subject of another motion pending before
 6 this Court. Presumably, Plaintiff’s counsel is aware that this number is easily within most court’s
 7 parameters for satisfying numerosity. Furthermore, the information Mr. Jon did provide shows that
 8 in a single year, 2007 for example, AutoZone employed at least 411 employees. *See*, Jon Tr. at 160.
 9 Again, this is easily sufficient as a number to establish numerosity.

10 Topic 6, the RFA’s. Plaintiff’s Deposition Notice asked that AutoZone produce a person
 11 who could testify about why AutoZone denied Plaintiff’s Requests for Admission 1-3. Plaintiff’s
 12 counsel suggests that Mr. Jon never gave any answer to this line of inquiry, but he did. Mr. Jon
 13 testified:

14 A Yes. I just want to add that you asked me about if I can determine if people were paid on
 15 time or
 16 not based on Exhibit 3. Our Payroll Department, when they get a request for paychecks for
 17 the last – you know, they deal with 50 states. So they are very qualified to tell when
 everyone gets paid on time, and we do that very diligently. If there's a mistake, for whatever
 reason, when it's brought to our attention we will rectify it appropriately. So I wanted to
 make sure I stated that.

18 Jon Tr. at 123:-124:7. This answer is entirely consistent with AutoZone’s specific denial of
 19 Plaintiff’s Requests for Production 1-3.

20 In regard to Plaintiff’s questions about who created AutoZone’s summary report, Plaintiff’s
 21 counsel was told:

22 The request seeks a witness to testify to the person who created the summary document Bates
 23 numbered AZ/Migis 0001212-1215. If you want a witness to testify to the person who
 24 prepared that report, we will produce a witness. However, the report was created in
 25 Memphis, TN, and the witness will be located in Memphis, TN. I also told you that we are
 attempting to retrieve all termination reports and all final pay information for the employees
 on the summary list.

1 *See*, Exhibit 3, Declaration of Tift.

2 **III. ARGUMENT AND AUTHORITY**

3 For all of the factual reasons set forth above, the Court should deny Plaintiff's motion to
4 "bind" AutoZone to insufficient answers. The answers of Mr. Jon, to the extent they are insufficient,
5 are flawed because Plaintiff's inquiries concern legal matters or were so confusing that anyone
6 would be hard pressed to answer them. As a legal matter, AutoZone complied with its obligations
7 under ORCP 39C.

8 **A. Plaintiff's Deposition Notice was Flawed.**

9 In Oregon, parties are required to disclose documents that exist and are relevant to that
10 party's affirmative defenses. *Asato v. Dunn*, 206 Or.App. 753 (2006) stands for that proposition, but
11 does not stand for the broad proposition that a party can serve a 39C(6) deposition notice and inquire
12 about legal theory, attorney client communication, or attorney work product.

13 In *Asato*, there was a discovery request directed to the plaintiffs to produce "financial and
14 investment-related documents." The Court ordered discovery of these documents, the plaintiffs
15 refused, and sanctions were imposed. Plaintiff's inquiries to AutoZone do not concern the same
16 kind of information. Instead, Plaintiff asked that a lay witness testify about the "material facts" that
17 are the bases for legal defenses, i.e., estoppel, laches, and the rules related to class certification. A
18 corporate defendant is not obliged to prepare a witness to testify about the theory that underlies an
19 legal defense. Estoppel, laches, and the requirements for class certification are not topics that are
20 familiar to non-lawyers—unlike a party's own financial documents, as was the case in *Asato*.

21 AutoZone does not disagree that a 39C(6) representative must come prepared and be
22 knowledgeable, but does contend that just as a party is precluded from asking a lay witness what a
23 lawyer explained to him or her before a deposition, Plaintiff was precluded from exploring legal
24 theory, attorney client communications and attorney work product with a corporate witness.
25 AutoZone maintains that issuance of a 39C deposition notice doesn't change that.

1 There is compelling case law to support AutoZone's position. In *Ecrix v. Exabyte*, 95 F Supp
 2 2d 1155 (DC Colorado 2000), for example, the court explained that questions which seek the
 3 discovery of the theory of an affirmative defense or which "invade the privacy of the trial
 4 preparation process" fall under the category of mental impressions and are impermissible inquiry.
 5 *Ecrix* is based upon a long line of authority reinforcing a distinction between facts and legal
 6 impression and legal theory:

7 The distinction implicit in Rule 26(b) (3) between documents and tangible things, which are
 8 discoverable upon the proper showing, and facts for which no special showing is required, in
 9 no way intimates that Rule 26(b)(3) opens to discovery an attorney's mental impressions. On
 10 the contrary, the Rule provides that when discovery is ordered upon the proper showing, "the
 11 court shall protect against disclosure of the mental impressions, conclusions, opinions, or
 12 legal theories of an attorney or other representative of a party concerning the litigation."

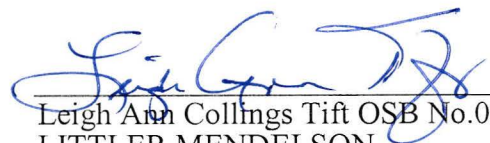
13 *See, Ford v. Phillips Electronics Instruments Co.*, 82F.R.D. 359, 360 (E.D. Pa 1979). *See, also,*
 14 *Laxalt v. McLatchy*, 116 F.R.D. 438, 443 (DC Nevada 1987):

15 The Court is mindful, however, that there is a possibility that a discussion of factual matters
 16 may reveal counsel's tactical or strategic thoughts. (citation omitted) This appears to have
 17 been at least part of the impetus behind defendants' objections at deposition, in that the
 18 plaintiff's questions to the deponents asked them simply to recall all of the relevant facts in
 19 the litigation. Such broad based questions seem inappropriate...

20 **B. Plaintiff's Motion should be Denied in its Entirety.**

21 AutoZone asks that Plaintiff's Motion be denied in its entirety. AutoZone made a good faith
 22 effort to produce a witness able to testify to the topics set forth in the first 39C(6) deposition notice.
 23 Mr. Jon made a good faith effort to answer questions put to him. However, no corporate witness
 24 could be adequately prepared to discuss legal theory, such as that demanded by Plaintiff.
 25
 26

1 Dated: June 12, 2008

2
3 
4 Leigh Ann Collings Tift OSB No.05473
5 LITTLER MENDELSON
6 A Professional Corporation

7 Attorneys for Defendant
8 Autozone Inc.
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CERTIFICATE OF SERVICE

I hereby certify that on May 12, 2008, I served a full, true, and correct copy of the foregoing:

**DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION TO "BIND
OR COMPEL ORCP 39C(6) DEPOSITION ANSWERS**

- ☐ By delivery via messenger, or otherwise by hand,
- ☒ By facsimile,
- ☐ By e-mail,
- ☒ By mailing same, postage paid

addressed to:

Bailey Pinney & Associates LLC
Attorneys at Law
1498 SE Tech Center Place
Suite 290
Vancouver, WA 98683
Fax (360) 567-3331

Of Attorneys for Plaintiff

By



Savanna Stevens

Firmwide:85529811.1 013306.2124

1
2 **IN THE CIRCUIT COURT OF THE STATE OF OREGON**
3 **FOR THE COUNTY OF MULTNOMAH**
4
5

6 MICHAEL MIGIS, individually, and on
7 behalf of all other persons similarly
8 situated,

9 Plaintiff,

10 vs.

11 AUTOZONE INC., a Nevada
12 Corporation,

13 Defendant.

No. 0711-13531

**DECLARATION OF LEIGH ANN TIFT IN
SUPPORT OF DEFENDANT'S
OPPOSITION TO PLAINTIFF'S SECOND
MOTION TO COMPEL**

DATED: JULY 11, 2008

14 I, Leigh Ann Collings Tift, hereby declare as follows:

15 1. I am an attorney representing Autozone Inc. in the above-captioned matter, and I
16 make this declaration in support of Defendants' Opposition to Plaintiff's Motion to Enforce Court
17 Order. I have personal knowledge of the statements contained herein.

18 2. Plaintiff filed this action in November, 2007. Since that time, Plaintiff has served
19 four separate sets of discovery requests. In response, AutoZone has produced more than 2200 pages,
20 and I, AutoZone's store managers, and employees at AutoZone's corporate offices have reviewed
21 countless more. Recently, we have communicated AutoZone's agreement to produce all time
22 records for every Oregon employee in a one year period of time, and this will result in thousands
23 more pages of information that will be produced to Plaintiff. Further, Ms. Alpern and I met with
24 Plaintiff's counsel at their offices for a discovery conference and have participated in at least a dozen
25 telephone conferences with Plaintiff's counsel to discuss discovery matters.
26

1 3. This motion to compel follows one such conference, and was filed even though
2 Plaintiff's counsel had been told that AutoZone would review the demands made in a conference on
3 May 15, and would attempt to comply with them. Mr. Powelson stated to Ms. Alpern and me that he
4 was going to file a motion to compel before we summarized our agreement to produce additional
5 documents and/or produced additional documents although he feared he would "no doubt be thrown
6 under the bus" because he filed the motion without waiting for the promised results of the discovery
7 conferences. Mr. Powelson could not be persuaded to wait for the documents we agreed to produce
8 before filing a motion to compel.

9 4. AutoZone provided more than 150 pages of time records for Mr. Migis, back through
10 2004. Examples of the documents AutoZone produced are attached as **Exhibit 1** to this Declaration.

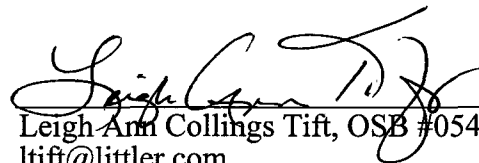
11 5. AutoZone also produced Mr. Migis' weekly earnings records. Examples of the
12 documents AutoZone produced are attached as **Exhibit 2** to this Declaration.

13 4. Attached as **Exhibit 3** to this Declaration is a true and correct copy of a letter Ms.
14 Alpern sent to Plaintiff's counsel on May 23, 2008 summarizing our discovery conferences.

15 5. Attached as **Exhibit 4** to this Declaration is a true and correct copy of a second letter
16 Ms. Alpern sent to Plaintiff's counsel discussing AutoZone's discovery and summarizing discovery
17 conferences held with Plaintiff's Counsel.

18 6. Attached as **Exhibit 5** to this Declaration is a true and correct copy of an email
19 exchange between Ms. Alpern and Mr. Powelson. AutoZone agreed to produce an expanded report
20 of weekly hours worked by AutoZone employees, but these records contain social security numbers
21 and other personal data. Ms. Alpern asked that Mr. Powelson sign and return a stipulated protective
22 order because of the nature of the information contained in the employee records. Rather than sign,
23 Mr. Powelson delayed, accused Ms. Alpern of holding documents "hostage" and generally made a
24 relatively simple exercise difficult. This conversation occurred after the motion to compel was filed
25 and caused delay.

1 Dated: June 6, 2008

2 
3 Leigh Ann Collings Tift, OSB #05473
4 ltift@littler.com
5 LITTLER MENDELSON
6 A Professional Corporation

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Attorneys for Defendant
AUTOZONE, INC.

CERTIFICATE OF SERVICE

I hereby certify that on June 6th, 2008, I served a full, true, and correct copy of the following document:

**DECLARATION OF LEIGH ANN TIFT IN SUPPORT OF DEFENDANT'S
OPPOSITION TO PLAINTIFF'S SECOND MOTION TO COMPEL**

as indicated below:

- ☐ By delivery via messenger, or otherwise by hand,
☒ By facsimile,
☐ By e-mail,
☒ By mailing same, postage paid,

addressed to:

Bailey Pinney & Associates LLC
Attorneys at Law
1498 SE Tech Center Place
Suite 290
Vancouver, WA 98683
Fax (360) 567-3331

Of Attorneys for Plaintiff

By 
Savanna L. Stevens

Firmwide:85472906.1 013306.2124

EXHIBIT 1

PR2437 R01
PRSMSFTR

AUTOZONE, INC.
SMS PAYROLL
SMS TIME FINAL HISTORICAL REPORT

PAGE NO. 25096
09:52 02/07/06

REDACTED

L1/L2: AS-71 CENTER: 2236

EMPLOYEE	MIGIS, MICHAEL							
STORE	SRC	+-DATE/TIME IN--+	TRANSIN	+-DATE/TIME OUT--+	TRANSOUT	HOURS	PAY TYPE	RSN
2236	ADJ	06/01/29 00:00:00	571509	06/01/29 00:00:00	571509	8:00	VACATION	03 ADD/CHG VAC HOURS
2236	CRD	06/01/31 07:39:00	569607	06/01/31 17:12:00	569940	9:33	REGULAR	
2236	CRD	06/02/01 07:36:00	570122	06/02/01 12:19:00	570282	4:43	REGULAR	
2236	CRD	06/02/01 13:17:00	570360	06/02/01 18:11:00	570663	4:55	REGULAR	
2236	CRD	06/02/02 12:35:00	571002	06/02/02 18:26:00	571341	5:51	REGULAR	
2236	CRD	06/02/02 19:23:00	571396	06/02/02 21:14:00	571510	1:51	REGULAR	
****	EMPLOYEE HOURS		FISCAL WEEK 23			34:53		

PR2437 R01
PRSMSFTRAUTOZONE, INC.
SMS PAYROLL
SMS TIME FINAL HISTORICAL REPORTPAGE NO. 25179
09:20 01/31/06

REDACTED

L1/L2: AS-71 CENTER: 2236

EMPLOYEE	MIGIS, MICHAEL							
STORE SRC	+-DATE/TIME IN--+	TRANSIN	+-DATE/TIME OUT--+	TRANSOUT	HOURS	PAY TYPE	RSN	
2236 CRD	06/01/22 11:43:00	563628	06/01/22 16:35:00	563975	4:53	REGULAR		
2236 CRD	06/01/22 16:36:00	563975	06/01/22 16:36:00	563975	0:00	REGULAR		
2236 CRD	06/01/23 12:38:00	564371	06/01/23 16:52:00	564607	4:14	REGULAR		
2236 CRD	06/01/23 18:01:00	564617	06/01/23 21:17:00	564860	3:16	REGULAR		
2236 CRD	06/01/24 07:32:00	564872	06/01/24 12:07:00	565040	4:34	REGULAR		
2236 CRD	06/01/24 13:15:00	565104	06/01/24 18:04:00	565401	4:49	REGULAR		
2236 CRD	06/01/26 12:34:00	566286	06/01/26 17:14:00	566523	4:40	REGULAR		
2236 CRD	06/01/26 18:22:00	566555	06/01/26 21:04:00	566705	2:42	REGULAR		
2236 CRD	06/01/27 07:41:00	566718	06/01/27 12:09:00	566869	4:28	REGULAR		
2236 CRD	06/01/27 13:17:00	566928	06/01/27 18:19:00	567203	5:02	REGULAR		
****	EMPLOYEE HOURS		FISCAL WEEK 22		38:38			

EXHIBIT 2

Report ID: PPS414 v1.1
 Company AZO AUTOZONERS INC
 10090549 MIGIS,MICHAEL

PeopleSoft
 EMPLOYEE 2003 QUARTER 1 EARNINGS RECORD

Page No. 1
 Run Date 02/28/2008
 Run Time 13:12:33

Paygrp	Payenddt	---Regular/OT---		---Other Earnings---		-----Taxes-----			Deductions Dedn	----- 2003 Quarter 1 Year To Date -----			
		Hours	Earnings	Hours	Earnings	Fed	State	Local		GrossYTD	TaxesYTD	DedYTD	NetPayYTD
OPH	2003-01-04	73.10	900.00	16.00	192.00	255.93	68.89	0.00	144.69	5,922.90	1,383.77	867.63	3,671.50
OPH	2003-01-18	80.65	971.70	0.00	0.00	220.53	59.68	0.00	144.81				
OPH	2003-02-01	83.85	1029.30	0.00	0.00	236.80	63.91	0.00	147.11				
OPH	2003-02-15	82.00	996.90	0.00	0.00	227.66	61.53	0.00	145.82				
OPH	2003-03-01	76.75	921.00	0.00	0.00	206.19	55.96	0.00	142.78				
OPH	2003-03-15	75.60	912.00	0.00	0.00	203.67	55.29	0.00	142.42				
rand Total Line		471.95	5730.90	16.00	192.00	1350.78	365.26	0.00	867.63				

AZ/MIGIS 0000282

EXHIBIT 3



May 23, 2008

Amy R. Alpern
Direct: 503.889.8878
Direct Fax: 503.914.1816
aalpern@littler.com

VIA FACSIMILE (360) 567-3331 AND U.S. MAIL

Chey Powelson
Bailey Pinney & Associates LLC
1498 SE Tech Center Place, Suite 290
Vancouver, WA 98683

Re: *Migis v. AutoZone, Inc.*
Multnomah County Circuit Court Case No. 0711-13531

Dear Chey:

On May 15, 2008, I suggested that we set up a telephone conference between you, Bud Bailey, me and Leigh Ann Tift to discuss ways in which we might resolve some of the discovery issues in this case. On May 16, 2008, the four of us spoke via telephone and agreed that the best way to proceed would be to have a face-to-face discovery conference on May 21. I suggested that both you and Mr. Bailey attend the discovery conference with Ms. Tift and I, but Mr. Bailey stated that you are responsible for discovery in the case and that his participation at the meeting was not necessary.

In preparation for the meeting, I asked you to identify for me those documents which plaintiffs believe are outstanding. You agreed, and in fact sent me a letter on May 16 outlining the issues which plaintiffs wished to address at the meeting. You also sent me a copy of the May 9, 2008 letter that you had sent to Ms. Tift regarding discovery. I reviewed those letters, all three document requests, defendant's responses to those requests, along with the documents produced to date, prior to our meeting.

As planned, on May 21, 2008, Ms. Tift and I met you (and Brad Griffin) at your office and discussed in detail all of the current discovery issues. I believe we made progress at that meeting and expect to make more progress as we proceed.

As you recall, we started our discussion by reviewing the documents requested in your May 16, 2008 letter. I set forth here my understanding of our discussion, and have done so in the order outlined in your letter.

1. You asked if defendant will re-designate and produce in Oregon, at defendant's expense, one or more persons to respond to the questions previously asked in the May 15 ORCP 39(c)(6) deposition notice, but to which designee could not respond

Chey Powelson
 May 23, 2008
 Page 2

because he did not know. I responded by telling you that the objections we raised with respect to the categories listed in the notice still stand, and that we will not re-designate a witness on categories that we believe will result in impermissible inquiries into attorney-client privileged information. I did advise you that Mark Dessem, whose ORCP 39(c)(6) deposition has been noticed, should be able to address the issue set forth in category 9 of your May 15, 2008 deposition notice, along with a number of the payroll related questions put to Mr. Jon. I also told you at the May 15 deposition that we would provide you with additional information regarding the total number of full- and part-time hourly AutoZone employees for the relevant period of time set forth in the complaint. (This information relates to category 6 of the May 15 deposition notice.)

I have to say, Chey, that the questions asked at the May 15, 2008 deposition went even deeper into attorney-client areas than I had anticipated. To compound matters, on more than one occasion Mr. Bailey re-asked questions that I had already instructed the witness not to answer on the basis of attorney-client privilege. For example, on page 104 of the transcript – rough draft only – I instructed the witness not to answer a question regarding what documents were relied on in connection with the Request for Admissions. On pp. 105, 109 and 122, Mr. Bailey repeats the question even though he knew at that point that defendant had asserted the privilege as to that question. This conduct is extremely troubling.

2. You asked when defendant will produce the “attendance calendars” referred to during the May 15 deposition. (You requested such calendars for all hourly employees for a one-year period.) You state in your May 16 letter that these records fall within the scope of plaintiffs’ Second Set of Requests for Production Nos. 4, 5 and 6.

As we discussed, in Request for Production No. 4, you ask for documents reflecting dates and times when any AutoZone employees working in the State of Oregon missed their meal periods for the period of time from three years prior to the filing of the complaint, up to the present. Request No. 5 seeks weekly schedule reports referencing Mr. Migis’s approved and unapproved work schedules and Request No. 6 seeks a weekly summary of hours worked by Mr. Migis. These requests do not seek “attendance calendars,” and only Request No. 4 seeks records regarding any employee other than Mr. Migis. As you know, the parties had conferred in connection with the Court’s order compelling discovery and agreed that documents responsive to Request No. 4 would be limited to the time periods covering May 1, 2005 through August 2005, November 1, 2005 through February 2006, and May 1, 2006 through August 2006. Documents containing information about missed meal periods for those time periods have already been produced, and defendant has fully satisfied Request for Production No. 4. Nonetheless, I agreed to provide you with an example of an “attendance calendar,” assuming one exists. (In reviewing Mr. Jon’s

Chey Powelson
May 23, 2008
Page 3

deposition transcript it occurs to me that he may have meant "variance reports" when he used the term "attendance calendar." Again, I will follow-up.)

With respect to Request for Production No. 5 (weekly schedule reports referencing Mr. Migis's work schedule, both approved and unapproved, for three years prior to the filing of the complaint), we advised you that we will double-check our records but we do not believe that additional responsive documents exist. We will let you know if we are able to find additional documents by June 3, 2008.

Defendant also agreed that it would double-check its records to determine if there are additional responsive documents to plaintiffs' Second Request for Production No. 6. In that request, plaintiffs seek a weekly summarization of hours worked by Mr. Migis. Once again, we believe that documents 281-486, Mr. Migis' weekly earnings records, and documents 708-753, fully respond to this request. Nonetheless, if we are able to locate "attendance calendars" for Mr. Migis for the time period requested, those documents will be produced. At the deposition of Mr. Migis, you asked for a screen print of his "paycheck data," presumably for his last paycheck. We will provide this.

3. We advised you that defendant would not stipulate to the admissibility of the summary termination report for all purposes. For your information, that report is not even a business record under ORE 803.
4. We told you that defendant will get back to you regarding defendant's willingness to stipulate to the authenticity of the documents set forth in your May 9, 2008 letter to Ms. Tift. We will do so by June 3, 2008.
5. We told you that defendant will produce, in electronic Microsoft Excel format, the lunch variation reports that have been previously produced to you in hard copy. Please understand that we agreed to produce this information in Excel format only because Ms. Tift previously stated that she would do so. However, defendant cannot understand why plaintiffs believe they can continue to pursue the discovery of documents that relate solely to the missed meal period claim since it is very clear to us that that claim will soon be dismissed from the case. Nonetheless, and in the spirit of cooperation, defendant agrees to produce the requested documents in the requested format, and will have it to you by June 3, 2008.
6. Plaintiffs asked whether defendant will produce one year's worth of time records for all hourly employees in the State of Oregon. (Plaintiffs' Third Set of Requests for Production No. 5.) As you know, I personally reviewed the correspondence in this case and could not help but notice your May 19, 2008 letter to Ms. Tift in which you proposed production of a random selection of time records, and gave, by way of

Chey Powelson
May 23, 2008
Page 4

example, one out of four or five employees' records. (You made this suggestion on the condition that defendant stipulate that such time records would be representative of the one year's worth.) You also state in that letter that if defendant would not stipulate that the random selection was in fact representative of the year, then you would have to compel the entire year's worth of records. You next proposed that if defendant did not agree to stipulate to the one in five suggestion, that you would propose accepting records on one out of three people, provided that defendant allow plaintiff to depose the IT person who compiled the time records. Finally, as you state in your letter, you had been willing to send defendant a proposal outlining those options to Ms. Tift. You then changed your mind and withdrew the offer to submit a proposal when Ms. Tift wrote you a follow up letter in which she stated that you had not agreed to send such a proposal. Your decision to withdraw your offer to send a written proposal outlining the one in three or one in five employee production scenarios, assuming you had so agreed, does not seem to be in the spirit of cooperation.

At our discovery conference, I suggested that a possible resolution would be for defendant to produce records for one month each quarter. This suggested resolution would eliminate any concerns about whether the information being provided was "representative." Plaintiffs not only refused this idea, but refused to agree to either of plaintiffs' earlier proposals regarding the one in three and one in five representative employees.

7. You asked whether defendant preserved documents pursuant to Judge Kantor's order for the preservation of evidence, and whether defendant will attempt to produce all daily coverage reports for a two-year time period. First, as you have often pointed out, this case is not the Joarnt case. Second, we feel that we did comply with Judge Kantor's order, but your expectations about what was kept in period boxes does not match what was actually, routinely kept by Store Managers. Beyond that, AutoZone did not retain the coverage reports for the period you request, as we told you in our responses.
8. Plaintiffs asked whether defendant will produce all reports reflecting weekly summarizations of hours worked by AutoZone employees pursuant to plaintiff's Third Set of Requests for Production No. 4. As we pointed out to you in the meeting, we produced such information to you on a disk identified as "AZ-Migis 2214." I understand that you would like the information in a different format, i.e., broken down by each individual employee, and we told you that that is not how we read the request but that we will determine how long it would take to put together responsive documents. We will let you know our position on this by June 3, 2008.

Chey Powelson
May 23, 2008
Page 5

9. Plaintiff asked whether defendant has produced all prior versions of the summary report produced in response to the first court order on plaintiff's First Request for Production Nos. 2, 4 and 6, and defendant confirmed that there are no prior versions of that report.

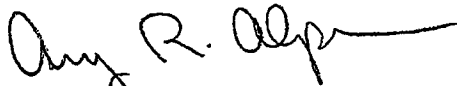
In addition to the above, defendant advised plaintiffs that defendant is making another effort to find additional termination reports.

I am also able to advise you that Ms. Tift has now personally reviewed the contents of the period boxes at the last two stores in which Mr. Migis worked. She found no termination reports and no other responsive documents at either location.

All in all, I do have a much better understanding as to plaintiffs' outstanding discovery concerns. I can say that I am somewhat surprised that, in some situations, plaintiffs are asking for the same information, but in a different format, and am surprised that plaintiffs are asking for documents that we believe relate exclusively to meal and break period claims. Notwithstanding this, defendant will take all of the steps outlined above and will get back to plaintiffs by June 3.

Very truly yours,

LITTLER MENDELSON



Amy R. Alpern

ARA/jrs

EXHIBIT 4



June 3, 2008

Amy R. Alpern
Direct: 503.889.8878
Direct Fax: 503.914.1816
aalpern@littler.com

VIA MAIL AND FACSIMILE 360-567-3331 AND U.S. MAIL

Chey Powelson
Bailey Pinney & Associates, LLC
1498 SE Tech Center Place, Suite 290
Vancouver, WA 98683

Re: Migis v. AutoZone, Inc.
Multnomah County Circuit Court Case No. 0711-13531

Dear Chey:

This follows up on my May 23, 2008 letter to you in which I outlined what we were willing to do to resolve the outstanding discovery issues. In that letter I told you that I would get back to you by June 3, and I am now doing so. For reasons that cause me great concern, you continued to file motions to compel, and to ask for yet additional documents, while we are diligently working to produce those items outlined in my May 23 letter. Indeed, I do believe at this point that you are intentionally making things more difficult than they need to be. For example, I prepared a protective order and asked that you sign it. (I told you that the form of protective order I prepared had been approved by the Multnomah County Presiding Court.) Rather than signing my order, you sent me a different order and required that we submit that order, instead. I did not want to fight about the issue, so I agreed to sign your proposed order and then brought it to the scheduling conference to ask the Court to sign it per our discussion on May 23. When I asked you to sign the order at that scheduling conference, you said you could not do so because you prepared it for Mr. Bailey's signature. I then asked Mr. Bailey, who was also at the scheduling conference, to sign it. He said he could not do so because he had not read it. When I pointed out to him that it was on your firm's letterhead, and urged him to sign it, he finally agreed to do so. However, when I presented it to Judge Maurer at the scheduling conference, she had concerns about the language in the order and asked her assistant to review it. As it now stands, we do not have a signed protective order.

I have now enclosed another protective order that complies with the Multnomah County rules. I signed it, ask that you do so, and ask that you forward it to the Presiding Court.

Moving on to my May 23, 2008 letter, I respond as follows:

1. We agreed to allow you to depose Mark Dessem as a corporate representative pursuant to ORCP 39(c)(6) even though you have already taken one 39(c)(6)

ALABAMA

ARIZONA

ARKANSAS

CALIFORNIA

COLORADO

CONNECTICUT

DISTRICT OF COLUMBIA

FLORIDA

GEORGIA

ILLINOIS

INDIANA

MASSACHUSETTS

MINNESOTA

MISSOURI

NEVADA

NEW JERSEY

NEW YORK

NORTH CAROLINA

OHIO

OREGON

PENNSYLVANIA

RHODE ISLAND

SOUTH CAROLINA

TEXAS

VIRGINIA

WASHINGTON

Chey Powelson
June 3, 2008
Page 2

deposition. We believe that Mr. Dessem is likely to be able to address some of the issues set forth in the 39(c)(6) notice that took place on May 15, 2008.

I also told you at the May 15 deposition that we would provide you with additional information regarding the total number of full- and part-time hourly AutoZone employees for the time periods set forth in your notice. We reviewed the W-2s for 2006 and can advise you that AutoZone employed 423 employee in Oregon that year. As you recall, we have already provided you with this information for the year 2007. I am still working on 2004 and 2005 and will respond to that request, although I am told that the information is on the payroll tax reports that were produced to your firm in the Joarnt matter. Nonetheless, I will review those reports as well, and get our answer to you promptly.

2. As I suspected, the reference to "attendance calendars" in Mr. Jon's deposition is, in fact, a reference to the variance reports. Since we have already produced the variance reports, we have already satisfied this request.

With respect to Request for Production No. 5 (weekly schedule reports referencing Mr. Migis' work schedule, both approved and unapproved, for three years prior to the filing of the complaint), we have now double-checked the period boxes for the two stores in which Mr. Migis worked in Oregon and can confirm that no additional records responsive to this request exist.

We also agreed to send you a screen print of Mr. Migis' paycheck data. It is enclosed.

3. See my May 23 letter.
4. With respect to the May 9 letter you sent to us regarding the authenticity of documents, I can advise you that defendant will stipulate that each of the listed documents, with one exception, is authentic, i.e., that they are what they purport to be. The exception is AG-Migis 0002214. We do not have a copy of that and I suspect that we may have made a numbering mistake.
5. We promised you that we would produce, in electronic Microsoft Excel format, the lunch variation reports that have been previously produced to you in hard copy. I understand that Leigh Ann Tift FedExed those to you yesterday and that you are in possession of those.
6. Defendant has reconsidered its objection to your request for one year's worth of time records for hourly employees in the State of Oregon, but have two caveats. Defendant will seek to shift the cost of producing these records to plaintiff if we are

Chey Powelson
June 3, 2008
Page 3

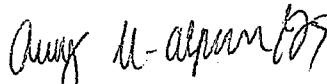
able to establish that they are not relevant, and/or if the class is not certified. Second, we are agreeing to produce the documents pursuant to the terms of a mutually agreeable protective order. With that understanding, defendant will produce electronic records of time worked for each AutoZone employee from November 2006 to November 2007. Please let me know when you have signed the order and have forwarded it to the Court, and we will produce the documents.

7. See my May 23 letter.
8. Defendant has located and is willing to produce reports reflecting weekly summarizations of hours worked by AutoZone employees as requested in Plaintiff's Third Request for Production No. 4. Defendant is willing to produce this information pursuant to the terms of a protective order. Please let me know when you have signed that order and forwarded it to the Court, and we will provide you with the requested documents.
9. As promised, defendant's store managers are making a second attempt at finding termination reports. We have looked at the personnel files of all employees to assure that no termination reports were missed, and the AutoZone's Store Managers have been asked to complete their review by June 5. I will let you know what, if anything, they are able to locate. Given Ms. Tift's experience in reviewing the period boxes for the last two stores in which Mr. Migis worked, I strongly doubt that we will find additional responsive documents. Nonetheless, we have taken the time consuming step of looking a second time.

Please understand that your discovery requests have been extremely cumbersome, that we have spent the last month telling you that we want to work cooperatively on discovery issues. As you can see, we have offered several concessions. Despite that, you continue to file motions to compel and motions for sanctions. At some point, I do hope that we are able to move this case in a direction that is likely to benefit our respective clients. That is what you want, right?

Very truly yours,

LITTLER MENDELSON


Amy R. Alpern

ARA/jrs
Enclosures

Review Paycheck - Windows Internet Explorer

http://astro.autozone.com:8080/psp/HRPROD/EMPLOYEE/HRMS/c/MAINTAIN_PAYROLL_DATA_US.PAY_CHECK.USA?Folder=

File Edit View Favorites Tools Help

Review Paycheck Home

ORACLE

Home

Paycheck Information

Paycheck Status: Confirmed Paycheck Option: Check

Issue Date: 02/15/2006 Paycheck Number: 59113

☒ Off Cycle ☒ Reprint ☒ Adjustment ☒ Corrected ☒ Cashed

Paycheck Totals

Earnings: 1,140.80

Taxes: 311.90

Deductions: 0.00

Net Pay: 828.90

Earnings Find | View All First 1 of 1 Last

Begin Date: 02/12/2006 End Date: 02/25/2006 Addl Line #: Reason: Not Specified

Employment Record Number: 0 Benefit Record Number: 0 Additional Data

Salaried	Hourly	Overtime
Hours: 0.00	Hours: 26.90	Hours: 0.00
Rate: 12.550000	Rate: 12.550000	Rate: 0.000000
Earnings: 0.00	Earnings: 337.60	Earnings: 0.00
Rate Code:	Rate Code:	Rate Code:

Rate Used: Hourly Rate Shift: N/A Shift Rate: FLSA Rate:

State: OR Locality:

Other Earnings Customize | Find | View All | First 1 of 1 Last

Other Earnings Details 1 Other Earnings Details 2

Code	Description	Rate Used	Hours	Rate	Amount
HVA	HOURLY VACATION	Hourly Rate	64.00	12.550000	803.20

Special Accumulators Customize | Find | View All | First 1-3 of 3 Last

Code	Description	Hours	Earnings	Empl Rcd #
401	401k Eligible Earnings	90.90	1,140.80	0
PEN	Pension Eligible Earnings	90.90	1,140.80	0
PRH	PUERTO RICO BONUS HOURS	26.90	337.60	0

Start | Review Paycheck - Wi... | AutoZone, Inc. | Investo... | 06/03/2006 11:54:54 A... | PUBLIC QUERY AZO_LA...

AZ-MIS 0002222

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

MICHAEL MIGIS, individually, and on
behalf of all other persons similarly
situated,

Plaintiff,

vs.

AUTOZONE, INC., a Nevada
corporation,

Defendant.

Case No. 0711-13531

STIPULATED PROTECTIVE ORDER

It is hereby ORDERED as follows:

1. Any party to this action may designate as confidential any document sought to be discovered by any other party that is "confidential material" as defined by this order. The terms of this order shall govern as to all aspects of the procedures to be followed in making or challenging such designations, and the terms, conditions, and restrictions on the use of confidential materials.

2. When used in this order, the word "documents" includes, but is not limited to: documents produced by any party or non-party in this action pursuant to the Oregon Rules of Civil Procedure or by subpoena; responses to requests for admission; responses to interrogatories; deposition transcripts and exhibits; electronically stored information; and any portions of any court papers that quote from or summarize any of the foregoing.

3. All documents or testimony designated as confidential in accordance with this order shall be treated as confidential by the parties, their attorneys, persons assisting their attorneys, and by

1 anyone else to whom any such document or any such information is disclosed. Such documents and
2 information shall be used only for purposes of this litigation and for no other purpose. Provided,
3 further, that disclosure of Confidential Information is intended, at least preliminarily, for review only
4 and may be subject to redaction to protect employee (non-class member) privacy.
5

6 4. For purposes of this order, the term "confidential material" shall include any
7 documents that contain or disclose confidential medical or financial information, personal
8 information regarding non-parties to this litigation, and trade secrets. The parties may designate
9 such documents as confidential by stamping such documents with the notice "CONFIDENTIAL"
10 prior to their production or by otherwise designating in writing such documents as confidential.
11

12 5. Any party to this action may designate as confidential that portion of any deposition
13 testimony containing or disclosing confidential material. The reporter shall separately transcribe
14 those portions of the testimony so designated and shall mark the face of the transcript as confidential
15 as the designating person may direct. The designating person may also make such a designation
16 after reading the deposition transcript if that person determines that testimony should have been but
17 was not designated confidential during the deposition. The designating person shall pay all expenses
18 related to such designation.
19

20 6. The parties and their attorneys shall designate as confidential only such documents
21 and information that reasonably require and necessitate confidential treatment in order to protect
22 confidences. By this Protective Order, the parties do not waive their right to contest designation of
23 any document or information as confidential. The parties agree to confer in good faith to resolve any
24 dispute over the confidential designation of any document or information prior to bringing such
25 matter to the attention of the Court.
26

1 7. Confidential documents or testimony may be referred to in pleadings, motions, and
2 briefs, and may be used in depositions and marked as deposition exhibits in this action. However, no
3 such document or testimony shall be used for any of these purposes unless it, or the portion of the
4 court paper in which it is revealed, is appropriately marked confidential and presented at ex parte to
5 the Presiding Judge to be filed under seal with the Court.

6
7 8. If a party seeks to file under seal any documents produced under this Protective
8 Order, the party must present the documents during ex parte to the Presiding Judge and make the
9 showing required pursuant to Fed. R. Civ. P. 26 and *Foltz v. State Farm Mutual Automobile Ins. Co.*,
10 331 F. 3d 1122 (9th Cir. 2003), in order to maintain the Protective Order as to such documents.
11 Before seeking to maintain protection of documents filed with the Court, a party must assess whether
12 redaction is a viable alternative to complete nondisclosure.

13
14 9. Except as set forth above, or with prior written consent of the party or non-party
15 asserting confidential treatment, no document or testimony designated as confidential and no
16 information contained in it or obtained from it may be disclosed to any person other than:

- 17 a. The court, its staff, and court reporters;
18 b. Outside and in-house counsel for the parties in this action and their staff;
19 c. Independent experts retained by counsel for the parties to assist them in this litigation;
20 d. The parties in this action and their agents, including but not limited to their insurers,
21 authorized to assist them in this litigation; and
22
23 e. Actual and potential witnesses to the extent necessary to verify or challenge the
24 information. Before any non-party witness is given confidential information, such witness shall sign
25 a declaration substantially in conformity with Exhibit A hereto. Upon request by a party producing
26

1 confidential information, any party disclosing such confidential information shall provide a list of all
2 persons to whom such disclosure was made.

3 10. This order shall not prevent the disclosure of documents to the persons who were
4 authors or addressees of the documents or are shown as having received copies of them, nor does
5 this order apply to testimony or exhibits offered at trial.

6 11. Documents produced by parties or non-parties that are designated confidential and all
7 copies of them (other than exhibits or records) shall either be destroyed or returned to the attorney of
8 the party producing such documents when the action is concluded. The attorney producing the
9 confidential document may request the attorney representing the party who received the confidential
10 document to prepare and deliver a letter containing a truthful assurance that all documents, copies, or
11 reproductions of such documents (including data compilations and extracts) are being destroyed or
12 returned to the party's counsel.

13 12. The restrictions and obligations relating to documents or testimony designated as
14 confidential in accordance with this order shall not apply to any document or information that all
15 parties agree in writing or that this court rules was publicly known at the time it was produced to the
16 receiving party or that has since become publicly known through no fault of the receiving party.

17 13. Nothing in this order shall prevent any party or non-party to this action from seeking
18 modification of this order or from objecting to discovery that it believes to be otherwise improper.
19 Any party or person may, at any time, file a request with the court to lift the restrictions of this order
20 as to any and all information designated confidential. The party designating the information as
21 confidential shall bear the burden of proving by a preponderance of the evidence that such
22 information is, in fact, confidential within the meaning of applicable law and that the interests of the
23
24
25
26

1 party's confidentiality outweigh other relevant interests.

2
3 Dated: _____, 2008.

4
5
6 _____
Judge

7 IT IS SO STIPULATED:

8
9 By: Ang R. Alpen, for

10 Leigh Ann Collings Tift, OSB No. 054732
11 Littler Mendelson, PC
Of Attorneys for Defendant

12
13 By: _____

14 A.E. Bud Bailey, OSB No. 871577
Of Attorneys for Plaintiff

EXHIBIT 5

Tift, Leigh Ann C.

From: Alpern, Amy R.
Sent: Wednesday, June 04, 2008 9:57 AM
To: Chey Powelson
Cc: Tift, Leigh Ann C.
Subject: RE: Protective Order

Interesting, Chey. Without knowing what information is in the documents, you assume that we are holding them "hostage" rather than assuming that we have a legitimate basis for requesting a protective order. The fact is, the weekly summarizations of hours worked report contains social security numbers and other confidential information. If you do not sign and forward the protective order based on my representation that we have documents that are appropriately covered by such order, feel free. The delay, at this point, is due to your refusal to sign the protective order. Not much I can do at this point.

Amy R. Alpern|Littler Mendelson, PC
The National Employment & Labor Law Firm®

Telephone: 503.221.0309 | Fax: 503.242.2457
Cell: 503.539.9811

From: Chey Powelson [mailto:cpowelson@wagelawyer.com]
Sent: Wednesday, June 04, 2008 9:45 AM
To: Alpern, Amy R.
Cc: Tift, Leigh Ann C.; Bud Bailey; Brad Griffin; Charity Shindle
Subject: RE: Protective Order

In other words, the time records are being held hostage?

From: Alpern, Amy R. [mailto:AApern@littler.com]
Sent: Wednesday, June 04, 2008 9:43 AM
To: Chey Powelson
Cc: Tift, Leigh Ann C.; Bud Bailey; Brad Griffin; Charity Shindle
Subject: RE: Protective Order

What I told you when we were at the case management conference was that the form of order I had submitted to you, and that you refused to sign, was signed by Judge Mauer in another case I had in Multnomah and that as a consequence, I knew the language was acceptable. What I suggest you do is sign and submit the protective order as is. If you object to the confidential designation of any documents we produce, we can discuss it at that time. There is, in the order, a mechanism for challenging the designation. I thought, based on the numerous motions to compel, that you want to move forward with document production. Your conduct is causing unnecessary delay. I have documents ready to produce as soon as I get the word from you that they order has been submitted and signed.

Amy R. Alpern|Littler Mendelson, PC
The National Employment & Labor Law Firm®

6/6/2008

Telephone: 503.221.0309 | Fax: 503.242.2457
Cell: 503.539.9811

From: Chey Powelson [mailto:cpowelson@wagelawyer.com]
Sent: Wednesday, June 04, 2008 9:36 AM
To: Alpern, Amy R.
Cc: Tift, Leigh Ann C.; Bud Bailey; Brad Griffin; Charity Shindle
Subject: RE: Protective Order

I appreciate that time is of the essence, but there are some problems with the proposed protective order you faxed yesterday evening. I will send you a letter this morning. In the meantime, please forward: (1) the Oregon state case you referenced after our case management conference with Judge Maurer last week, re: protective orders; and (2) your reasoning as to what "confidential" information the hourly employee time records. From the sounds of it, Defendant is anticipating that the entire class certification briefing be filed under seal. That is, as you know, contrary to the presumptive public access to court records. Thank you.

From: Alpern, Amy R. [mailto:AAIpern@littler.com]
Sent: Wednesday, June 04, 2008 9:11 AM
To: Chey Powelson
Cc: Tift, Leigh Ann C.
Subject: Protective Order

Chey,

Please advise as quickly as possible as to the status of the protective order I sent to you. As you know, the documents you requested are covered by that order and I cannot produce them until you sign the order.

Best regards,

Amy R. Alpern|Littler Mendelson, PC
The National Employment & Labor Law Firm®

1750 SW Harbor Way, Suite 450
Portland, OR 97201
Telephone: 503.221.0309 | Fax: 503.242.2457
Cell: 503.539.9811
Email: aalpern@littler.com

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6/6/2008

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To reply to our email administrator directly, send an email to postmaster@littler.cc

Littler Mendelson, P.C.
<http://www.littler.com>

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To reply to our email administrator directly, send an email to postmaster@littler.cc

Littler Mendelson, P.C.
<http://www.littler.com>

6/6/2008

**IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH**

MICHAEL MIGIS, individually and on behalf
of all others similarly situated,

Plaintiff,

v.

AUTOZONE, INC., a foreign corporation,

Defendant.

Case No. 0711-13531

**PLAINTIFF'S REPLY IN SUPPORT
OF THE SUPPLEMENTAL
BRIEFING RE: PLAINTIFF'S
MOTION TO ENFORCE COURT
ORDER**

I. INTRODUCTION

The Court should grant the relief requested. AutoZone fails to rebut the fundamental premise of Plaintiff's *Motion*: that despite this Court's warnings in the March 7, 2008 hearing, Defendant has openly resisted the rules of discovery and failed to comply with two Court Orders.

The requested relief is consistent with Oregon law, and necessary to ensure that AutoZone will not engage in future, similar conduct.

II. POINTS & AUTHORITIES

A. Overview

This entire dispute may be reduced to the following question: If, as Defendant presently suggests, the Excel summary report cannot be relied upon to conclusively determine whether AutoZone failed to timely pay at least one terminating employee, then why did AutoZone belatedly produce it in response to the first Court Order and inform the Court it was the information relied upon to deny Plaintiff's Requests For Admission addressing that very issue?

1 Defendant's denials to the Requests For Admission also presume AutoZone conducted the
2 reasonable inquiry ORCP 45 requires, and knew or knows when each employee within the
3 relevant time period terminated employment with the company.

4 It would have been more appropriate for AutoZone to simply admit the Requests For
5 Admission, or admit during either the March 7 or April 8 hearings (or both) that AutoZone did
6 not conduct any inquiry into these matters and therefore had no information or documents to
7 produce because AutoZone attorneys contrived the denials.

8 Now AutoZone tries to put the toothpaste back in the tube.

9 Defendant claims, essentially, that it has no idea when any of its employees on the Excel
10 summary report terminated employment. This looks like a strategic decision by AutoZone to,
11 despite two Court orders, turn this matter into an "individualized inquiry." So it appears
12 Defendant would rather be sanctioned by this Court, delay the proceedings, and defend Plaintiff's
13 attempts at class certification, rather than admitting the Requests for Admission.

14 "Modern discovery practices seek to facilitate (however haltingly) open, even-handed, and
15 efficient development of the relevant facts so that justice may be achieved and cases decided
16 fairly on the merits. To that end, lawyers have a duty to act in good faith in complying with their
17 discovery obligations and to cooperate with and facilitate forthright discovery." *New Medium*
18 *Techs. LLC v. Barco N.V.*, 242 F.R.D. 460, 464 (N.D.Ill. 2007).

19 "Belated compliance with discovery orders does not preclude the imposition of sanctions.
20 Last-minute tender of documents does not cure the prejudice to opponents nor does it restore to
21 other litigants on a crowded docket the opportunity to use the courts." *Payne v. Exxon Corp.*, 121
22 F.3d 503, 508 (9th Cir. 1997) (internal cite omitted).

23 And as this Court reminded the parties during the April 8 hearing, "It's axiomatic that the
24 judges expect Court orders to be complied with."

25 AutoZone has undermined the efficient development of relevant facts relating to the
26 putative class' late pay claim. This is no more evident than in reviewing Defendant's own

1 *Opposition*, wherein AutoZone:

- 2 1. Fails to persuasively argue there are no more documents.
- 3 2. Fails to understand Plaintiff's requests for non-monetary relief.
- 4 3. Fails to rebut Plaintiff's request for an ORCP 46B(3) mandatory award of expenses
- 5 for AutoZone's violation of the first Court Order.
- 6 4. Admits failing to fully comply with the second Court Order, and cannot demonstrate
- 7 such failure substantially justified.

8 But the most concerning aspect of this matter is AutoZone's dogged insistence that it "did
9 not fail or refuse to obey this Court's rulings on discovery matters." *Opposition* at p. 7:20-21.
10 That contention is contrary to: (a) AutoZone's conduct, (b) this Court's findings, and (c) Oregon
11 law governing the failure to obey court orders.¹

12 **B. AutoZone Fails to Persuasively Argue There Are No More Documents.**

13 AutoZone does not expressly rebut Plaintiff's argument there may be additional
14 documents not produced, such as "check requests" resulting in the "Off Cycle" checks identified
15 in the Excel summary report. See Plaintiff's *Supplemental Briefing*, p. 13. Instead, Defendant
16 innocently claims it "is unaware of any other kind of document that constitutes an 'underlying
17 document' related to the summary report * * * ." *Opposition* at p. 7:22-23.

18 This purported ignorance of additional documents does not withstand scrutiny. For
19 example, AutoZone's own *Opposition* reveals that for an employee's involuntary termination,
20 a Human Resources and store manager must schedule a "dismissal conference." *Opposition* at
21

22 ¹ See Plaintiff's: (1) April 4, 2008 *Motion to Enforce Court Order*, pp. 8 - 9; and (2) May
23 22, 2008 *Supplemental Briefing*, p. 9. See also, *Pamplin v. Victoria*, 319 Or 429, 433-34 (1994)
24 (Court looking to the U.S. Supreme Court decision set forth in *Societe Internationale*); *Belinsky*
25 *v. Clooten*, 214 Or App at 180-182 (analyzing *Pamplin*); *SAIF Corp. v. Harris*, 161 Or App 1,
26 7-8, *rev. denied*, 329 Or 527 (1999); and *Societe Internationale v. Rogers*, 357 U.S. 197, 208
(1958) ("For purposes of subdivision (b)(2) of Rule 37, we think that a party 'refuses to obey'
simply by failing to comply with an order.") (cited in *Belinsky*). Cf. *Thomas v. Victoria's Secret*
Stores, 141 F.R.D. 456, 458-59 (S.D.Ohio 1992) ("The failure to respond to a court order,
without justification, after being fully informed of the obligation to respond and the penalties for
non-compliance can be deemed to be willful misconduct.").

1 p. 6:18-20.

2 AutoZone then admits that even prior to the dismissal conference, the “HR manager must
3 approve terminations and **request a check** from payroll * * *.” *Opposition* at p. 6:18-21 (bold
4 added). This presumes a document trail relating to the involuntary termination, and the creation
5 of the type of business record AutoZone testified to: a **check request** resulting in a manual, “Off
6 Cycle” check. See Plaintiff’s *Supplemental Briefing*, p. 13:15-25. The check request would
7 presumably be dated the same day the store or Human Resource manager called corporate
8 headquarters regarding the impending termination, and could indicate the employee’s anticipated
9 last day of employment.

10 But AutoZone has not produced a single check request or explained what information the
11 check request would or would not have. Instead, Defendant pretends they never existed. This
12 may be a strategic decision because if produced the documents may undermine Defendant’s
13 denials.

14 C. Defendant Fails to Understand Plaintiff’s Requests For Relief.

15 1. Overview

16 Oregon trial courts have discretion and flexibility “in framing an appropriate sanction
17 where a party fails to obey a discovery order.” *Belinskey v. Clooten*, 214 Or App 172, 182
18 (2007), *rev. denied*, 344 Or 194 (2008).²

19 AutoZone continually refused to produce discovery in response to Plaintiff’s November
20 2007 discovery requests,³ and then failed to acknowledge its obligation to produce discovery as
21

23 ² Cf. *Goldman v. Alhadeff*, 131 F.R.D. 188, 191 (W.D.Wash. 1990) (“The decision to
24 impose sanctions under Rule 37 is left to the court’s discretion. **Exercise of that discretion has**
25 **been ‘encouraged’** when ‘counsel or a party has acted willfully or in bad faith in failing to
26 comply with rules of discovery or with court orders enforcing the rules or in flagrant disregard
of those rules and orders.” (bold added) (cites omitted)).

³ See Plaintiff’s February 2008 *First Motion for an Order Compelling Discovery*, pp. 3 -
5.

1 required by this Court's first Order.⁴

2 The opportunity for AutoZone to conduct a reasonable inquiry when responding to the
3 Requests For Admission, and look for and produce all responsive documents, arose: (a) as early
4 as January 2008 when document production was initially due, and (b) as late as the first Court-
5 ordered deadline of March 28, 2008. Only after AutoZone consciously disregarded its obligations
6 does it attempt to explain why it has not facilitated forthright discovery.

7 **2. Relief Under ORCP 45C and 46C**

8 Based on this Court's comments during the April 8 hearing (and as reflected in Plaintiff's
9 *Supplemental Briefing* at page 3, footnote 1), Plaintiff is not at this time expressly seeking relief
10 under ORCP 45C and 46C, but will wait until further on in the litigation, or after trial.

11 It also bears noting, however, that not only are the matters sought to be admitted
12 important,⁵ but AutoZone's denials to Plaintiff's Requests For Admission also give rise to the
13 presumption that AutoZone knew when each one of those employees – approximately 150 on the
14 Excel report – terminated employment with AutoZone.

15 **3. Preclusion of Evidence**

16 AutoZone ignores Plaintiff's argument that the Court preclude AutoZone from opposing
17 the Excel summary report information only for those employees Defendant has not provided any
18 Termination Reports.

19 ///

20 _____
21 ⁴ See Defendant's June 5, 2008 *Opposition*, p. 2 (March 28, 2008 Second Supplemental
22 Response to RFP No. 2: "With respect to Plaintiff Migis, Defendant maintains that Plaintiff has
all relevant documents * * * .").

23 ⁵ See also ORS 652.200(2): "In any action for the collection of wages, if it is shown that
24 the wages were not paid for a period of 48 hours, excluding Saturdays, Sundays and holidays,
after the wages became due and payable, the court shall, upon entering judgment for the plaintiff,
25 include in the judgment, in addition to the costs and disbursements otherwise prescribed by
statute, a reasonable sum for attorney fees at trial and on appeal for prosecuting the action * * *."
26 Cf. ORS 652.150(4) (stating that certain defenses to late payment of wages does not apply when
"The employer has violated ORS 652.140 * * * one or more times in the year before the
employee's employment ceased * * * .").

1 This type of sanction not only prevents a disobedient party from benefitting from its own
 2 non-production, but is also “warranted for the purpose of facilitating the administration of justice,
 3 even in the absence of prejudice.”

4 Facilitating the administration of justice means the Court should hold AutoZone to the
 5 representations it made during hearing on April 8 that the summary report is responsive to the
 6 Court-ordered production, and is what Defendant looked to when denying the Requests For
 7 Admission.

8 **4. Designation of Facts**

9 When ordering the designation of facts as a sanction, courts “attempt to closely tailor the
 10 **presumed** facts to the withheld information to the extent possible.” *General Atomic Co. v. Exxon*
 11 *Nuclear Co.*, 90 F.R.D. 290, 59 (S.D.Cal. 1981) (bold added). That is, there must be a nexus
 12 between the designation and the court-ordered discovery relating to the claim or defense.
 13 *General Ins. Co. of Am. v. Eastern Consol. Utils*, 126 F.3d 215, 220-21 (3rd Cir. 1997) (citing
 14 *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 707 (1909)).

15 The Court should hold Defendant to its April 8 representations and deem that for the
 16 employees with no Termination Reports, the “Last Date” column in the Excel summary report
 17 is the information to which both Plaintiff and Defendant must look in determining whether those
 18 employees fall within the putative late pay class (i.e., presume that the “Last Date” is also the
 19 termination date).

20 This requested designation will not contravene the interests of justice. A review of those
 21 persons on the summary report for whom AutoZone did not produce underlying termination
 22 reports shows many of those people did not receive a manual, “Off Cycle” check. Rather,
 23 AutoZone appears to have issued those paychecks in the normal course of business, according
 24 to their twice-monthly Friday payday cycle. *Reply Decl.*, Ex. A (2006-2007 annual calendars).

25 In sum, no matter when the listed employees’ last day of employment, it appears that for
 26 most of the employees on the Excel report, AutoZone managers did nothing to facilitate a an Off

1 Cycle, manual check.⁶

2 In the alternative to the foregoing, Plaintiff suggests: (a) the Court designate the Last Date
3 as the Termination Date for those employees who are coded "A1" (Quit With Notice), regardless
4 of whether there are Termination Reports produced; and (b) allow Plaintiff to later pursue an
5 adverse inference (as opposed to a presumption) based on Defendant's failure to produce
6 discovery. See e.g., OEC 308 (presumptions); *State v. Dahl*, 336 Or 481, 486, *aff'd*, 336 Or 481
7 (2004); and *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 436 - 40 (S.D.N.Y. 2004) (court
8 permitting adverse inference jury instruction as a sanction for a party's failure to preserve and
9 produce evidence).⁷

10 **5. Striking the Pleadings**

11 Plaintiff is not seeking to strike Defendant's entire Answer, only certain affirmative
12 defenses as they relate to the late pay claim, based on the nexus between those defenses and: (a)
13 Defendant's conduct, and (b) the content and nature of Defendant's "answers" to Plaintiff's
14 Requests For Admission.

15 Those answers place Defendant's corporate "state of mind" expressly at issue, which in
16 turn relate to both the putative class's late pay claim and AutoZone's affirmative defenses that
17
18
19

20
21 ⁶ The "purpose [of ORS 652.150 regarding penalties for untimely payment of wages] is
22 to protect employees from unscrupulous **or careless employers** who fail to compensate their
employees although they are fully aware of their obligation to do so." *State ex rel. Nilsen v.*
Johnston, 233 Or 103, 108 (1962) (in context of earlier ORS) (bold added).

23 ⁷ "The distinction between [a presumption and an inference] is the difference between that
24 which is permitted and that which is demanded. An inference is permissible; a presumption is
25 required." *Simpson v. Gray Line Co.*, 226 Or 71, 73 (1961) (in context of former ORS 41.340).
For example, "[a]n inference is a deduction from facts which reason dictates, but a presumption,
26 in its true sense, is an arbitrary conclusion which the law directs to be made from certain facts.
If you look through the window and see someone carrying a raised umbrella you might reasonably
infer that it is raining, but there would be no presumption that it is raining." *Judson v. Bee Hive*
Auto Service Co., 136 Or 1, 10-11 (1931) (in context of former Oregon Code 1930, Sec. 9-801)

1 any unpaid wages the result of a good faith dispute.⁸

2 Defendant's *Opposition* confuses this issue, and erroneously relies on case law regarding
3 ORCP 21 motions to dismiss. Rule 21 does not address violations of court orders.

4 Conversely, Oregon cases addressing the striking of pleadings as a sanction for violating
5 court orders does not include analysis of the case law Defendant cites. The analysis is much
6 simpler: Oregon trial courts can strike the pleadings of litigants who disobeyed those courts'
7 orders.

8 In *Stauffer v. Or. Citizen's Alliance Educ. Found.*, the Court of Appeals affirmed a trial
9 court's discovery sanction of striking the defendants' pleadings, and later granting default
10 judgment against defendants after the trial court found that "The time and cost to plaintiff in delay
11 and the obstruction of the orderly conduct of the court's business remain." 211 Or App 11, 15-16
12 (2007).

13 In *Budden v. Dykstra*, after the trial court already ordered production of documents and
14 cautioned defendants about timely production, defendants lodged additional objections and
15 informed the plaintiff that the documents ordered were beyond their control. The court in turn
16 ordered that a particular affirmative defense be stricken for failure to follow the court's discovery
17 orders. 181 Or App 523, 526-27 (2002). The Court of Appeals affirmed the trial court's decision.

18 Nonetheless, this Court should note that "the validity of an order striking a pleading
19 pursuant to the statute under consideration is restricted to those cases where the failure to answer
20 obviously withholds a fact or facts material to his adversary's case and is limited to the effect that
21 ensues from any reasonable presumption which may be drawn from the refusal to discover such
22 fact or facts." *Anderson v. Stanwood*, 178 Or 306, 317 (1946) (in context of defendant witness
23 refusing to answer a question under oath). This concept also applies to the refusal or failure to
24

25 ⁸ This issue also overlaps with Defendant's ORCP 39C(6) deposition testimony on May
26 15, 2008, wherein AutoZone was not, for example, aware of any facts supporting or surrounding
a good faith belief whether AutoZone owed or did not owe unpaid wages to Plaintiff Migis. See
Plaintiff's *Motion to Bind and/or Compel ORCP 39C(6) Deposition Answers*, p. 19. Plaintiff by
this reference hereby incorporates herein that *Motion to Bind*.

1 produce documents,⁹ although eventual document production is not determinative.

2 Should the Court decline to strike Defendant's affirmative defenses as to either (a) the
3 entire putative late pay class; or (b) the persons listed in the Excel summary report (see
4 *Supplemental Briefing* at p. 15), then another alternative exists: striking the affirmative defenses
5 for those persons in the Excel summary report who are coded "A1" ("Quit with notice") and for
6 whom there is no corresponding termination report. For those people it can readily be determined
7 from their last day worked whether AutoZone paid them on that same date, as Oregon law
8 requires.

9 **6. Deposing AutoZone via ORCP 39C(6)**

10 Oregon Rule of Civil Procedure 36B(1) expressly allows discovery into "the existence,
11 * * * and location of any * * * documents * * *."

12 In response to Plaintiff's *Motion* and supplemental briefing, Defendant failed to submit
13 a single affidavit or declaration from any AutoZone employee or manager, describing the efforts
14 undertaken to search for, locate, preserve, and produce all information (including "Termination
15 Reports") responsive to Plaintiffs' First Set of Requests For Production Nos. 2, 4 and 6, both
16 before and after the March 7, 2008 hearing on Plaintiff's Motion to Compel.

17 Instead, Defendant's counsel only generally assures the Court that they are "prepared to
18 represent that a good faith search has been conducted * * *."

19 Plaintiff must obtain discovery, not accept AutoZone's assurances on the record, because
20 AutoZone has also assured Plaintiff:

21 _____
22 ⁹ See *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 350-51 (1909): "This case
23 presents failure by the defendant to produce what we must assume was material evidence in its
24 possession and a resulting striking out of an answer and a default. The proceeding here taken may
25 therefore find its sanction in the undoubted right of the lawmaking power to create a presumption
26 of fact as to the bad faith and untruth of an answer begotten from the suppression or failure to
produce the proof ordered, when such proof concerned the rightful decision of the cause. In a
sense, of course, the striking out of the answer and default was a punishment, but it was only
remotely so, as the generating source of the power was the right to create a presumption flowing
from the failure to produce." See also, *Collazos v. United States*, 368 F.3d 190, 203 (2nd Cir.
2004) (citing *Hammond*); and *SEC v. Seaboard Corp.*, 666 F.2d 414 (9th Cir. 1982) (same).

- 1 (a) That it denied the Requests For Admission in good faith;
- 2 (b) That it acted in good faith in response to the first Court Order, even though it
- 3 produced no documents by the deadline, and apparently created the Excel
- 4 summary report after that deadline; and
- 5 (c) That, by means of the May 15 ORCP 39C(6) deposition, Defendant must look to
- 6 "additional documents or reports," apart from the Termination Report and final
- 7 paycheck data, to determine whether an employee who gave two weeks' notice of
- 8 intent to quit was paid on their last day of work. See e.g., Plaintiff's *Motion to*
- 9 *Bind and/or Compel ORCP 39C(6) Deposition Answers*, pp. 15 - 16.

10 **D. Defendant Fails to Rebut Plaintiff's Request for the Mandatory ORCP 46B(3)**
 11 **Award of Expenses for Autozone's Violation of the First Court Order.**

12 Plaintiff clearly articulated the justification for a mandatory award of expenses resulting
 13 from AutoZone's lack of good faith compliance with the first Court Order.

14 AutoZone completely failed to address this issue and explain why, by the first Court-
 15 ordered deadline, Defendant did not produce any documents but instead referred Plaintiff to his
 16 own.

17 Defendant also failed to dispute when the Excel summary report was created, and whether
 18 it or the information therein was in fact relied upon to deny Plaintiff's Requests For Admission.

19 But the answer is evident: the Excel summary report is an after-the-fact creation upon
 20 which AutoZone could not have relied on that information deny the Requests. This is supported
 21 by Defendant's instructions not to answer Request For Admission-related questions during the
 22 May 15 ORCP 39C(6) deposition, and Defendant's later admission that made such instructions
 23 to prevent Plaintiff from inquiring into what documents AutoZone relied on in connection with
 24 the Request For Admissions. See Plaintiff's *Motion to Bind and/or Compel ORCP 39C(6)*
 25 *Deposition Answers*, p. 19.

26 ///

1 **E. Defendant Admits it Failed to Fully Comply with the Second Court Order.**

2 "The party against whom an award of expenses is sought has the burden of showing the
3 special circumstances that make his failure to comply 'substantially justified.'" *Liew v. Breen*,
4 640 F.2d 1046, 1050 (9th Cir. 1981) (citing, in part, 1970 Advisory Committee Notes to
5 Fed.R.Civ.Pro. 37).¹⁰

6 AutoZone did not timely produce all documents that exist and are responsive to the second
7 Court Order. Even for those existing Termination Reports, Defendant produced some of them
8 after the second Court-ordered deadline. Based on the Court's denial of Defendant's *Motion for*
9 *Extension of Time* and comment that the *Motion* was not well taken, AutoZone was not
10 substantially justified in the late production of those Reports. ORCP 46B(3).

11 Furthermore, as already indicated, there are or should be other responsive documents, such
12 as check requests and termination documentation, the non-production of which Defendant fails
13 to explain.

14 **III. CONCLUSION**

15 For all the reasons set forth herein and all prior, related briefing, Plaintiff respectfully
16 requests the Court grant all relief as is just and proper under the circumstances.

17
18 SIGNED this 16th day of June 2008.

19 BAILEY, PINNEY & ASSOCIATES, LLC

20 
21 CHEY POWELSON, OSB 03551
22 Of Attorneys for Plaintiff

23
24 ¹⁰ See also, *Creative Res. Group of New Jersey, Inc. v. Creative Res. Group, Inc.*, 212
25 F.R.D. 94, 102 (E.D.N.Y. 2002) ("Rule 37 allows for the imposition of sanctions in the form of
26 reasonable fees and costs incurred by reason of a party's discovery failures. This court finds that
the plaintiff was forced to expend wholly unnecessary time and effort in its unsuccessful attempts
to get the defendants to comply with their discovery obligations. This waste of time and resources
was caused by the defendants' bad conduct, which required the plaintiff to make motions to
compel and motions for sanctions.").

CERTIFICATE OF SERVICE

I hereby certify that I caused to be served the foregoing *Plaintiff's Reply in Support of the Supplemental Briefing Re: Plaintiff's Motion to Enforce Court Order* upon:


Leigh Ann Tift
Littler Mendelson
One Union Square
600 University St, Ste 3200
Seattle WA 98101-3122
Attorney for Defendant AutoZone

by the following indicated method or methods:

☒ by causing a full, true, and correct copy thereof to be deposited in the U.S. regular mail service to the person listed above on the date set forth below.

DATED June 16, 2008

BAILEY, PINNEY & ASSOCIATES, LLC



CHEY POWELSON, OSB 035512
Attorney for Plaintiff

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

MICHAEL MIGIS, individually, and on
behalf of all other persons similarly
situated,,

Plaintiff,

vs.

AUTOZONE INC., a Nevada
Corporation,,

Defendant.

No. 0711-13531

**DEFENDANT'S REPLY IN SUPPORT OF
MOTION FOR PARTIAL JUDGMENT ON
THE PLEADINGS AND STATEMENT OF
POINTS AND AUTHORITIES IN SUPPORT**

[ORAL ARGUMENT REQUESTED]

I. INTRODUCTION

Plaintiff Michael Migis ("Migis") concedes that he has no private right of action for his rest period claim in light of the Oregon Supreme Court's recent holding in *Gafur v. Legacy Good Samaritan Hosp. & Med. Center*, 344 Or 525 (May 15, 2008) ("*Gafur II*"). Those claims must be dismissed. However, with respect to his meal period claims, Migis attempts to distinguish his claims from those asserted by the plaintiffs in *Gafur* by recasting and rephrasing his claims. Migis is simply wrong on the law and unable to meaningfully distinguish the meal claims in his Complaint from those in *Gafur*. Thus, Migis's claim for unpaid meal periods must also be dismissed as a matter of law.

II. ARGUMENT AND AUTHORITY

ORCP 21B authorizes the court to enter judgment on the pleadings: "when the pleadings, taken together, affirmatively show that the plaintiff has not stated a claim for relief motion for judgment on the pleadings should be granted." *Slogowski v. Lyness*, 324 Or 436, 439, 927 P2d 587

(1996) (quotation omitted). For purposes of an ORCP 21B motion, a court must accept the allegations of the pleading as true. *Beason v. Harclerod*, 105 Or App 376, 379-80, 805 P2d 700 (1991). Judgment on the pleadings should be entered when, given the well-pleaded facts, the defendant is entitled to judgment as a matter of law. *Smith, et al. v. Washington County, et al.*, 180 Or App 505, 523-24, 43 P3d 1171 (2002). Here, there is simply no legal basis for Migis's meal and rest period claims.

A. Migis's Rest Period Claim Must Be Dismissed

Migis concedes that he has no private right of action for his rest period claim. Plaintiff's Response at 1-2. Thus, this claim must be dismissed as a matter of law.

B. Migis's Meal Period Claim Should Be Dismissed

The Complaint filed by Migis makes the following allegations relative to the meal period claims:

¶7. Oregon law requires employer to provide employees an appropriate meal period which is uninterrupted for not less than 30 minutes....*If the meal period is interrupted by work or is less than 30 minutes in length the employer may not deduct any portion of the meal period from the employee's wages.*

¶8. AutoZone failed to provide Plaintiff...with meal periods of at least 30 uninterrupted minutes...AutoZone wrongfully deducted time and failed to pay Plaintiff...for meal periods taken that were interrupted by work or were less than 30 minutes long. *As a result, Plaintiff and class members are entitled to those wages improperly deducted...*

¶32 (Unpaid Meal Periods). AutoZone failed to provide Plaintiff...30 minute uninterrupted meal periods...*AutoZone failed to pay wages to its employees for meal periods of less than 30 minutes in length. As a result Plaintiff and other similarly situated class members are entitled to wages for the unprovided meal period violations...*

¶39 (Unpaid Meal Period Class). For Plaintiff and all similarly situated class members who worked for AutoZone in Oregon, within the six year period before the filing of this complaint, *from whom AutoZone deducted wages from the class members' wages for meal periods of less than 30 minutes in length.* (emphasis added)

Despite the gloss Plaintiff currently attempts to put on these claims, these are exactly the allegations that were made at the trial court in *Gafur*.

Accordingly, AutoZone maintains that the Court of Appeals decision in *Gafur v. Legacy Good Samaritan Hosp. & Med. Center*, 213 Or App 343 (2007) (rev'd on other grounds) ("*Gafur I*"), governs the meal period claims set forth in Migis's lawsuit. That is, as recited in *Gafur I*, the meal period claims alleged by the Plaintiff were:

42. ORS 653.261 provides for minimum employment conditions to be established by the Commissioner of the Oregon Bureau of Labor and Industries. OAR 839-020-0050 requires that employees receive an uninterrupted meal period of not less than thirty (30) minutes for each shift worked of six hours or greater.

43. *Defendant failed to provide Plaintiffs and all other similarly situated class members an uninterrupted meal period * * ** in violation of ORS 653.261 and OAR 839-020-0050 and failed to pay Plaintiffs and similarly situated class members for those meal periods not provided.

44. *As a result of Defendant's failure to provide uninterrupted meal periods as required, Plaintiffs and similarly affected class members are due wages for those meal periods which defendant failed to provide* * *.*

Id. at 348. (emphasis added).

In regards to the *Gafur* plaintiffs' claim for missed meal periods, the Court of Appeals held as follows:

Neither those statutes [cited in the complaint] nor the rules promulgated to implement them state that an employee is entitled to wages for meal breaks; ***OAR 839-020-0050(1)(a) requires meal breaks but not paid meal breaks.*** Therefore, the [trial] court did not err in dismissing plaintiffs' claims based on entitlement to wages for unreceived meal breaks.

Id. (emphasis added). It simply cannot be argued that the law in Oregon supports a private right of action for alleged "intrusions" into 30 minute unpaid meal periods¹ such as are alleged in this lawsuit.

While the Oregon Supreme Court did not consider the meal period claims that had been dismissed by the trial court in *Gafur* (and which decision was affirmed by the Court of Appeals in

¹ Migis does make an allegation in his Complaint that he was forced to work off the clock. That claim, per Migis's deposition testimony did not relate to having to record meal breaks but then working through them, but to an assertion that he had to deliver parts to other stores off the clock. Should an attempt be made later to amend this complaint to allege off the clock work during recorded meal periods, Migis will face the insurmountable hurdle of his own contrary testimony. See Declaration of Amy R. Alpern at Exhibit 1 (Migis Deposition Testimony at 154:1-15).

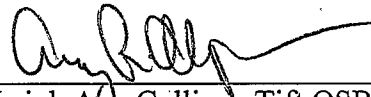
1 *Gafur I*), the Supreme Court's reasoning in regard to rest periods mandates dismissal of Plaintiff's
 2 meal period claims in this case. That is, the Oregon Supreme Court made it clear that Oregon law
 3 requires employers to pay employees for work time. Employers need not pay employees for time
 4 that is not work time. If an employee clocks out at AutoZone for lunch, but is called back after
 5 eighteen minutes, for example, the employee is not entitled to pay for the eighteen minutes that he
 6 did not work—however, he is entitled to be paid for every minute he spends "working" on his return
 7 from the abbreviated meal break.

8 *Gafur I* resolves the issue currently before this Court. The Court of Appeals holding in
 9 *Gafur I* that employees cannot sue their employers for missed meal periods has not been vacated,
 10 reversed or overturned, and there is no Oregon Supreme Court authority to the contrary. AutoZone
 11 asks that the Court dismiss Migis's meal period claims.

12 III. CONCLUSIONS

13 For the foregoing reasons, AutoZone respectfully requests that this Court dismiss Migis's rest
 14 and meal period claims in their entirety.

15
 16 Dated: June 19, 2008.

17 

18 Leigh Ann Collings Tift OSB No. 054732
 19 Amy R. Alpern OSB No. 840244
 20 LITTLER MENDELSON
 A Professional Corporation

21 Attorneys for Defendant
 22 Autozone Inc.

CERTIFICATE OF SERVICE

I hereby certify that on June 19, 2008, I served a full, true, and correct copy of the foregoing:

**DEFENDANT'S REPLY IN SUPPORT OF MOTION FOR PARTIAL JUDGMENT ON
THE PLEADINGS AND STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT**

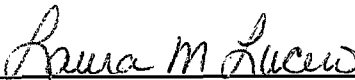
- ☐ By delivery via messenger, or otherwise by hand,
☒ By facsimile,
☐ By e-mail,
☒ By mailing same, postage paid

addressed to:

James Dana Pinney
Bailey Pinney & Associates LLC
Attorneys at Law
1498 SE Tech Center Place
Suite 290
Vancouver, WA 98683
Fax (360) 567-3331

Of Attorneys for Plaintiff

By



Laura Lucero

Secretary for Amy R. Alpern

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IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

MICHAEL MIGIS, individually, and on
behalf of all other persons similarly
situated,

Plaintiff,

vs.

AUTOZONE INC., a Nevada
Corporation,

Defendant.

No. 0711-13531

**DECLARATION OF AMY R. ALPERN IN
SUPPORT OF DEFENDANT'S REPLY IN
SUPPORT OF MOTION FOR JUDGMENT
ON THE PLEADINGS**

13 I, Amy R. Alpern, hereby declare as follows:

14 1. I am an attorney representing Autozone Inc. in the above-captioned matter, and I
15 make this declaration in support of Defendant's Reply in Support of Motion for Partial Judgment on
16 the Pleadings. I have personal knowledge of the statements contained herein.

17 2. Attached as Exhibit 1 are true and correct excerpts of the deposition transcript of
18 Michael Migis.

19
20 Dated: June 19, 2008



Amy R. Alpern, OSB #840244

aalpern@littler.com

LITTLER MENDELSON

A Professional Corporation

Attorneys for Defendant
AUTOZONE, INC.

EXHIBIT 1

Michael Migis

May 20, 2008

Page 1

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

MICHAEL MIGIS, individually,
and on behalf of all other
persons similarly situated,
Plaintiff,

vs. NO. 0711-13531

AUTOZONE, INC., a Nevada Corporation,
Defendant.

VIDEOTAPED
DEPOSITION OF MICHAEL MIGIS

Taken on Behalf of the Defendant
Tuesday, May 20, 2008

Beovich Walter & Friend

d4bf5154-1ee8-4713-889b-13fc3453a6d5

Michael Migis

May 20, 2008

Page 154

1 Q Okay. And then were you ever on the lunch
2 exception report for taking a short lunch?

3 A Yes.

4 Q And why would that happen?

5 A Customer service required me to go back on the
6 counter --

7 Q And when you --

8 A -- sooner than expected.

9 Q Sorry.

10 A I'm sorry.

11 Q No, my fault.

12 When -- and when you went back because a
13 customer needed you, you'd go back on the
14 clock?

15 A Yes.

16 Q Were you -- did you ever work in a store where
17 there wasn't lunch coverage, where there
18 weren't enough people physically present?

19 A Yes.

20 Q And where was that?

21 A All the stores I worked in, up here in Oregon.
22 And also down in Phoenix.

23 Q Was that because the stores weren't staffed
24 correctly or because people quit or people were
25 sick? What was the reason for it usually?

Beovich Walter & Friend

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CERTIFICATE OF SERVICE

I hereby certify that on June 19, 2008, I served a full, true, and correct copy of the following document:

DECLARATION OF AMY R. ALPERN IN SUPPORT OF DEFENDANT'S REPLY IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS

as indicated below:

- ☐ By delivery via messenger, or otherwise by hand,
- ☒ By facsimile,
- ☐ By e-mail,
- ☒ By mailing same, postage paid,

addressed to:

James Dana Pinney
Bailey Pinney & Associates LLC
Attorneys at Law
1498 SE Tech Center Place
Suite 290
Vancouver, WA 98683
Fax (360) 567-3331

Of Attorneys for Plaintiff

By Laura M Lucero
Laura Lucero

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7 **IN THE CIRCUIT COURT OF THE STATE OF OREGON**
8 **FOR THE COUNTY OF MULTNOMAH**

9
10 **MICHAEL MIGIS**, individually and on
11 behalf of all others similarly situated,

12 Plaintiff,

13 v.

14 **AUTOZONE, INC.**,

15
16 Defendant.

Case No. 0711-13531

**REPLY DECLARATION OF
CHEY K. POWELSON
SUPPORTING SUPPLEMENTAL
BRIEFING ON PLAINTIFF'S
MOTION TO ENFORCE COURT
ORDER**

17
18 I, Chey K. Powelson, hereby declare as follows:

- 19 1. I am one of the attorneys for Plaintiff herein. I am competent to testify in this matter,
20 and base the contents of this declaration on my own personal knowledge and/or the
21 litigation files and documents my firm maintains for this litigation.
- 22 2. Attached hereto as **Exhibit A** is a true and correct printout of two annual calendars
23 for 2006 and 2007, which I personally printed from the website:
24 www.timeanddate.com/calendar. A comparison of these calendars with those Excel
25 summary report checks (see "Check Dt" column) having a corresponding "N" in the
26

1 “Off Cycle” column, demonstrate that almost without exception that the checks relate
2 to a Friday, which upon information and belief is the established weekday for
3 AutoZone’s twice-monthly employee paydays.
4

5 I HEREBY DECLARE THAT THE ABOVE STATEMENT IS TRUE TO THE BEST
6 OF MY KNOWLEDGE AND BELIEF, AND THAT I UNDERSTAND IT IS MADE
7 FOR USE AS EVIDENCE IN COURT AND IS SUBJECT TO PENALTY FOR
8 PERJURY.

9
10 Dated this 16th day of June 2008 at Vancouver, Washington.

11
12 
13 _____
14 CHEY POWELSON, OSB 03551
15 Attorney for Plaintiff
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Calendar for year 2007 (United States)

January Su Mo Tu We Th Fr Sa 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31 3:☉ 11:☉ 18:☿ 25:☿	February Su Mo Tu We Th Fr Sa 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 2:☉ 10:☉ 17:☿ 24:☿	March Su Mo Tu We Th Fr Sa 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31 3:☉ 11:☉ 18:☿ 25:☿
April Su Mo Tu We Th Fr Sa 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 2:☉ 10:☉ 17:☿ 24:☿	May Su Mo Tu We Th Fr Sa 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31 2:☉ 10:☉ 16:☿ 23:☿ 31:☿	June Su Mo Tu We Th Fr Sa 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 8:☉ 14:☿ 22:☿ 30:☿
July Su Mo Tu We Th Fr Sa 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31 7:☉ 14:☿ 22:☿ 29:☿	August Su Mo Tu We Th Fr Sa 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31 5:☉ 12:☿ 20:☿ 28:☿	September Su Mo Tu We Th Fr Sa 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 3:☉ 11:☿ 19:☿ 26:☿
October Su Mo Tu We Th Fr Sa 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31 3:☉ 11:☿ 19:☿ 26:☿	November Su Mo Tu We Th Fr Sa 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 1:☉ 9:☿ 17:☿ 24:☿	December Su Mo Tu We Th Fr Sa 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31 1:☉ 9:☿ 17:☿ 23:☿ 31:☿

Holidays and Observances:

Jan 1 New Year's Day	May 28 Memorial Day	Nov 11 Veterans Day
Jan 15 Martin Luther King Day	Jul 4 Independence Day	Nov 12 'Veterans Day' observed
Feb 14 Valentine's Day	Sep 3 Labor Day	Nov 22 Thanksgiving Day
Feb 19 Presidents' Day	Oct 8 Columbus Day	Dec 25 Christmas Day
Apr 8 Easter Sunday	Oct 31 Halloween	

Calendar for year 2006 (United States)

January						
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March						
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May						
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June						
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August						
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September						
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October						
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November						
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December						
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30	31					
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Holidays and Observances:

Jan 1 New Year's Day
 Jan 2 'New Year's Day' observed
 Jan 16 Martin Luther King Day
 Feb 14 Valentine's Day
 Feb 20 Presidents' Day
 Apr 16 Easter Sunday

May 29 Memorial Day
 Jul 4 Independence Day
 Sep 4 Labor Day
 Oct 9 Columbus Day
 Oct 31 Halloween
 Nov 7 Election Day

Nov 10 'Veterans Day' observed
 Nov 11 Veterans Day
 Nov 23 Thanksgiving Day
 Dec 25 Christmas Day

CERTIFICATE OF SERVICE

I hereby certify that I caused to be served the foregoing *Reply Declaration of Chey K. Powelson Supporting Supplemental Briefing Re: Plaintiff's Motion to Enforce Court Order* upon:


Leigh Ann Tift
Littler Mendelson
One Union Square
600 University St, Ste 3200
Seattle WA 98101-3122
Attorney for Defendant AutoZone

by the following indicated method or methods:

☒ by causing a full, true, and correct copy thereof to be deposited in the U.S. regular mail service to the person listed above on the date set forth below.

DATED June 16, 2008

BAILEY, PINNEY & ASSOCIATES, LLC



CHEY POWELSON, OSB 035512
Attorney for Plaintiff

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**IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH**

MICHAEL MIGIS, individually and on
behalf of all others similarly situated,

Plaintiff,

v.

AUTOZONE, INC.,

Defendant.

Case No. 0711-13531

**PLAINTIFF'S REPLY
SUPPORTING PLAINTIFF'S
STATEMENT OF EXPENSES
(RE: DEFENDANT'S MOTION
FOR EXTENSION OF TIME)**

Through his attorneys herein, PLAINTIFF submits this *Reply* supporting his previously-
filed *Statement of Expenses* relating to Defendant's *Motion for Extension of Time*, upon which
this Court heard oral argument on April 22, 2008, and denied AutoZone's *Motion*.

First, despite Plaintiff's numerous requests, AutoZone's counsel has not corrected her
May 1, 2008 *Declaration* containing information this Court cannot rely upon to consider
AutoZone's objections to Plaintiff's fees. For example, Exhibit 1 (an April 16 letter) to Ms.
Tift's *Declaration* is not the correct exhibit for which Plaintiff billed the time and to which
Defendant now objects. The correct letter an April 17, 2008 letter, which Plaintiff's counsel had
drafted on April 16. Plaintiff's counsel pointed this out to Defendant's counsel, but to no avail.

///

1 Second, Plaintiff's April 21, 2008 billing for drafting the *Response* to Defendant's *Motion*
 2 also included time for drafting the supporting declaration, and reviewing a hearing transcript from
 3 the *Joarnt v. AutoZone* case, which involved similar issues to those in this Court's Orders.
 4 Plaintiff used portions of that transcript as an exhibit to the declaration.

5 Finally, Defendant tries to characterize Plaintiff's billing rate as "\$16,000/hour."
 6 *Defendant's Objections to May 22, 2008 Statement of Attorney Fee Request*, p. 1. Since Plaintiff
 7 requests less than \$9,000 for all expenses incurred as a result of Defendant's *Motion*, to achieve
 8 a rate of \$16,000 per hour Plaintiff would have had to perform all work in just over half an hour.
 9 Defendant's objection on this ground is therefore not reasonable.

10 Plaintiff respectfully requests the award of expenses, including attorneys' fees, incurred
 11 as a result of AutoZone's *Motion*, as set forth in the Statement of Expenses.

12
 13
 14 DATED this 16th day of JUNE 2008.

15
 16 BAILEY, PINNEY & ASSOCIATES, LLC

17
 18 
 19 _____
 CHEY POWELSON, OSB 035512
 Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that I caused to be served the foregoing *Plaintiff's Reply Supporting Plaintiff's Statement of Expenses (Re: Defendant's Motion for Extension of Time)* upon:

Leigh Ann Tift
Littler Mendelson
One Union Square
600 University St, Ste 3200
Seattle WA 98101-3122
Attorney for Defendant AutoZone

by the following indicated method or methods:

☒ by causing a full, true, and correct copy thereof to be deposited in the U.S. regular mail service to the person listed above on the date set forth below.

DATED June 16, 2008

BAILEY, PINNEY & ASSOCIATES, LLC



CHEY POWELSON, OSB 035512
Attorney for Plaintiff

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

MICHAEL MIGIS, individually, and on
behalf of all other persons similarly
situated,

Plaintiff,

vs.

AUTOZONE INC., a Nevada
Corporation,

Defendant.

No. 0711-13531

**DEFENDANT'S REPLY IN SUPPORT OF
ITS MOTION FOR PROTECTIVE ORDER**

NOTED FOR JULY 11, 2008

I. ARGUMENT

Defendant, AutoZone Inc. ("AutoZone"), has a motion pending before this Court seeking a protective order related to plaintiff's 39C(6) deposition notice demanding that AutoZone produce a nonresident corporate witness for the purpose of a deposition. In support of this motion, AutoZone relies on the following Points and Authorities, the Declarations of Leigh Ann Collings Tift ("Tift Decl.") and Mark Dessem ("Dessem Decl."), and the pleadings and records on file herein.

Plaintiff insists that he must depose defendant's 39C(6) designee, Mark Dessem, in Oregon despite the facts that (1) it is well settled that corporate witnesses are generally deposed at the principle place of business of the company, which, in this case, is Memphis, Tennessee; (2) Plaintiff has previously traveled to Memphis to depose this very witness in a related lawsuit, *Joarnt v. AutoZone, Inc.*; (3) plaintiff's attorney has already deposed several AutoZone witnesses on many of

1 the exact topics noted in his 39C(6) deposition notice, and AutoZone has offered to stipulate that
 2 their answers apply with equal force now as they did in 2005, when plaintiff asked the first time; and
 3 (3) Oregon law provides no right of action for certain of the topics noted for deposition regarding
 4 Oregon wage and hour laws.

5 **A. Plaintiff Has Not Demonstrated “Peculiar” or “Extraordinary” Circumstances**
 6 **Sufficient to Require Mr. Dessems’s Deposition in Portland**

7 It is well settled that the deposition of a corporation by its agents and officers should
 8 ordinarily be taken its principal place of business, especially where the corporation is a defendant.
 9 *Salter v. The Upjohn Co.*, 593 F.2d 649, 651 (5th Cir. 1979); *Moore v. Pyrotech Corp.*, 137 F.R.D.
 10 356, 357 (D. Kan. 1991) (stating that corporate depositions “are ordinarily taken at the corporation’s
 11 principal place of business unless justice requires otherwise”); *Farquhar v. Sheldon*, 116 F.R.D. 70,
 12 73 (E.D. Mich. 1987) (court refused to depart from “general rule requiring a defendant to be deposed
 13 where he resides”); *Six West Retail Acquisition, Inc. v. Sony Theatre Management Corp.*, 203 F.R.D.
 14 98, 107 (S.D.N.Y. 2001)(court refused to make two “high ranking executives of a major
 15 corporation” travel outside of their home forum for a deposition); *See*, also, 8A Charles Alan
 16 Wright, Arthur R. Miller & Richard L. Marcus, *Federal Practice and Procedure*: Civil § 2112 (2d
 17 ed. 2006)(“The deposition of a corporation by its agents and officers should ordinarily be taken at its
 18 principal place of business”). Indeed, courts have repeatedly opined that because plaintiffs choose
 19 where to bring the lawsuits, they “normally cannot complain if they must take discovery at great
 20 distances from the forum.” *See, Farquhar v. Sheldon*, 116 F.R.D. 70, 72 (E.D. Mich. 1987)(granting
 21 protective order requiring plaintiff to take defendant’s deposition in the Netherlands); *Payton v.*
 22 *Sears, Roebuck and Co.*, 148 F.R.D. 667, 669 (N.D. Ga. 1993)(granting a protective order protecting
 23 Sears and Sanyo from being deposed in Atlanta, Georgia, where the plaintiff in that action did not
 24 present any “compelling reason to depart from the general rule that a corporate defendant’s agent be
 25 deposed at the corporations principal place of business”).
 26

1 Plaintiffs bears the burden of demonstrating that corporate depositions should not be held at
2 the defendant's principal place of business, and can only overcome that presumption by
3 demonstrating "peculiar," "exceptional" or "unusual" circumstances. *See, Salter*, 593 F.2d 649, at
4 652; *Six West* 203 F.R.D. at 107; *Metrex Research Corp. v. U.S.*, 151 F.R.D. 122 (D. Colo. 1993);
5 *see, also, O'Sullivan v. Rivera*, 229 F.R.D. 187, 187 (D. N.M. 2004)(stating that plaintiff failed to
6 establish "undue hardship" or "exceptional circumstances" demonstrating that defendant should be
7 deposed outside of his home state).

8 Here, plaintiff has done nothing to overcome the presumption that Mr. Dessem's deposition
9 should take place in Memphis, Tennessee. Plaintiff has not even attempted to identify any peculiar,
10 exceptional, or unusual circumstances justifying a Portland deposition of a Memphis resident.
11 Indeed, in a similar and related action, plaintiff traveled to Memphis to depose this *very same*
12 *witness* without complaint. Tift Decl. ¶ 8; Dessem Decl. ¶ 12.

13 Plaintiff identifies several factors that he believes are in favor of conducting Mr. Dessem's
14 deposition in Portland, none of which are either peculiar or extraordinary, and some of which are
15 baseless. First, although plaintiff states in his Opposition that counsel for both parties reside "in or
16 very near the litigation forum," he is well aware that Ms. Tift lives and works in the Seattle area. He
17 is also aware that following Plaintiff's counsel's complaint that there were too many attorneys
18 involved on behalf of AutoZone in this matter, Ms. Tift became the principal contact in the case.
19 Finally, in actual fact, Plaintiff's counsel's office is not in Portland, so all three parties will have to
20 travel to Portland for a Portland deposition. Tift Decl. ¶¶ 5,6.

21 Second, Plaintiff suggests that "there is undoubtedly a strong likelihood that significant
22 discovery disputes may occur during the deposition," thus making the Portland location necessary.
23 However, to date, two depositions have been taken in this case, and neither party has felt it necessary
24
25
26

1 to call the judge during either deposition.¹ Tift Decl. ¶ 7. In *Joarnt*, the parties took a total of
 2 twelve depositions. Ms. Tift attended the majority of those depositions, and is familiar with the
 3 transcripts of all of the depositions in *Joarnt*. Not a single call was made to the Court in the course
 4 of these depositions. Tift Decl. ¶ 9. In fact, a review of the transcript of Mr. Dessem's previous
 5 deposition shows that there were no discovery disputes, no calls to the Court, and no appearances
 6 before the Court relating to Mr. Dessem's testimony. Tift Decl. ¶ 8. Unless plaintiff's counsel is
 7 determined that a dispute will occur this time, there is no historical reason to believe that there will
 8 be a discovery dispute requiring physical access to the Multnomah Courthouse. In any event, should
 9 there be a discovery dispute requiring Court intervention, it is as simple to call the Court from
 10 Memphis, Tennessee as it is from Portland, Oregon.

11 Third, as stated in the declaration of Mark Dessem, Mr. Dessem rarely travels for business.
 12 Because of his job responsibilities, Mr. Dessem spends the great majority of his time in AutoZone's
 13 corporate office so that he is readily available to subordinates and others who need him. Dessem
 14 Decl. ¶¶ 5, 9-10.

15 Fourth, although plaintiff tries to make it sound as though there are legions of plaintiffs
 16 whose very fate hangs on the whereabouts of the deposition at issue, the fact that there is a putative
 17 class in this action that has not been certified has no bearing on where Mr. Dessem's deposition
 18 should take place.

19 Finally, and importantly, traveling to have his deposition taken would be extremely
 20 disruptive for Mr. Dessem. Dessem Decl. ¶¶ 6, 8, 10. In *Six West*, the Court granted a protective
 21 order stating that two high level corporate officers did not have to travel to have their depositions
 22 taken where their "absence at work would [] adversely affect the defendants' affairs," 203 F.R.D. at
 23 107. The same holds true for Mr. Dessem, a busy executive running the payroll department for a
 24

25 ¹ Admittedly, Plaintiff filed a motion regarding the first of the 39C(6) depositions that were conducted of AutoZone
 26 witnesses, but the remedies requested by Plaintiff, i.e., to "bind" AutoZone to the witness' answers or to require another
 witness to appear in Oregon, don't militate a Portland location for the deposition of Mark Dessem.

1 large corporation for whom a three day, 2,000 mile plus trip from Memphis to Portland during an
 2 extremely busy time would constitute an undue burden. Dessem Decl. ¶¶ 9-11. Thus, in light of the
 3 well-settled case law and the equities of this case, Mr. Dessem's deposition should take place in
 4 AutoZone's principal place of business, Memphis, Tennessee.

5 **B. Mr. Dessem's Testimony Could be More Easily Done By Other Means.**

6 As an initial matter, it should be noted that the information sought in plaintiff's topics 1 and
 7 2, regarding the payment of final wages between November 16, 2006 and November 16, 2007, don't
 8 relate to Plaintiff Migis at all.² As plaintiff well knows, plaintiff Migas left AutoZone in *February*
 9 *of 2006*, eight months *before* plaintiff's topics of inquiry. Tift Decl. ¶ 10.

10 Despite this anomaly, Mr. Dessem has already testified regarding AutoZone's policies and
 11 practices for the payment of final wages in the *Joarnt* matter, as has AutoZone employee Kevin
 12 Bussey, and defendant will stipulate that such testimony is still accurate, with only slight
 13 modification (which Mr. Dessem swears to in his Declaration). *See*, Tift Decl. ¶ 11, Dessem Decl.
 14 ¶¶ 12-14. Testimony has also already been taken from AutoZone Managers relating to topics 6 and
 15 7, and defendant will stipulate to the accuracy of that testimony as well. *See*, Exhibits B, C and D to
 16 Declaration of Tift.

17 Topics 8 and 9 are completely irrelevant to this case, as the Oregon Supreme Court has
 18 recently decided that employees do not have a private right of action against their employees to
 19 recover unpaid wages for missed rest and meal periods. *Gafur v. Legacy Good Samaritan Hospital*
 20 *and Medical Center*, 344 Or. 525, 2008 WL 2054448 (Or.). This decision, which had not issued at
 21 the time that plaintiff noticed his 39C(6) deposition, completely obviates the need for any testimony
 22 on these topics.³

24 ² A true and correct copy of Plaintiff's First Amended ORCP 39C(6) Notice of Deposition of Defendant is attached to
 25 the Tift Decl. as Exhibit A (however, this notice actually schedules Plaintiff's second ORCP 39C(6) deposition of an
 AutoZone witness. The first witness appeared on May 15, 2008).

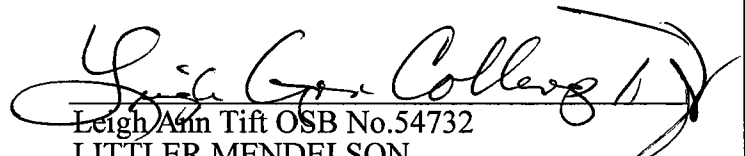
26 ³ It should be noted that Defendant filed a Motion for Partial Judgment on the Pleadings on this very topic on May 22,
 2008, which has yet to be decided by the Court.

1 Consequently, as few of plaintiff's topics actually need to be explored with Mr. Dessem, it
 2 cannot be argued that his deposition should be very short. This is further evidence that equity
 3 demands Mr. Dessem not be forced to travel over 2,000 miles and take 3 days off of work for a half-
 4 day deposition that could easily be taken by video conference. However, a video deposition is one
 5 of the options that plaintiff has already rejected out of hand.

6 II. CONCLUSION

7 For all of the reasons stated above, AutoZone respectfully requests that the Court grant its
 8 motion for a protective order, and command plaintiff to depose Mr. Dessem in Memphis, Tennessee.

9
 10 Dated: June ¹⁶~~16~~, 2008

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 12 
 13 Leigh Ann Tift OSB No.54732
 LITTLER MENDELSON
 A Professional Corporation

14 Attorneys for Defendant
 15 Autozone Inc.

CERTIFICATE OF SERVICE

I hereby certify that on June 16, 2008 I served a full, true, and correct copy of the foregoing
DEFENDANT'S REPLY IN SUPPORT OF ITS MOTION FOR PROTECTIVE ORDER:

- ☐ By delivery via messenger, or otherwise by hand,
☒ By facsimile,
☐ By e-mail,
☒ By mailing same, postage paid,

addressed to:

Bailey Pinney & Associates LLC
Attorneys at Law
1498 SE Tech Center Place
Suite 290
Vancouver, WA 98683
Fax (360) 567-3331

Of Attorneys for Plaintiff

By 
Sally Swearingen

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

MICHAEL MIGIS, individually, and on
behalf of all other persons similarly
situated,

Plaintiff,

vs.

AUTOZONE INC., a Nevada
Corporation,

Defendant.

No. 0711-13531

**DECLARATION OF LEIGH ANN TIFT IN
SUPPORT OF DEFENDANT'S REPLY IN
SUPPORT OF ITS MOTION FOR
PROTECTIVE ORDER**

NOTED FOR JULY 11, 2008

I, Leigh Ann Collings Tift, hereby declare as follows:

1. I am an attorney representing AutoZone Inc. in the above-captioned matter, and I make this declaration in support of AutoZone's Motion for a Protective Order. I have personal knowledge of the statements contained herein.

2. Attached as Exhibit A is a true and correct of plaintiff's First Amended ORCP 39(C) Notice of Deposition of Defendant. This was the second ORCP 39C(6) deposition noticed by Plaintiff of an AutoZone witness.

3. I live in Bainbridge Island, Washington, a suburb of Seattle. My office is located in Seattle, Washington.

4. In addition to being AutoZone's counsel in this action, I was also AutoZone's counsel in a related action, *Joarnt v. AutoZone*.

Firmwide:85570401.1 013306.2124

1 5. At a hearing before Judge LaBarre in April, Mr. Bailey stated that he'd dealt with a
2 number of attorneys from my firm in the *Migis v. AutoZone* matter, and that he found that
3 frustrating. At the hearing, the Court asked which attorney would be principally responsible for
4 AutoZone's defense, and I stated that I would be that person. I know that Plaintiff's counsel is
5 aware that I do not live in Portland nor work in my firm's Portland office, and, in fact, when we
6 were attempting to schedule a review of period boxes at Mr. Migis' last store last week, Plaintiff's
7 counsel, Mr. Powelson, gave an estimate for how long he believed it took for me to drive to
8 Portland.

9 6. I have been to Plaintiff's counsel's offices, which are in Vancouver, Washington.
10 Should a Portland deposition of Mr. Dessem be set, both attorneys would have to travel to Portland--
11 as would Mr. Dessem.

12 7. I took the deposition of Mr. Migis in this case, and have read the transcript of the
13 deposition of AutoZone's first 39C witness, Mr. Jon. In neither case did anyone call the Court to
14 resolve a discovery dispute.

15 8. Mark Dessem, the witness designated as AutoZone's 39C(6) in this action, was
16 deposed in *Joarnt*. That deposition took place in Memphis, Tennessee, AutoZone's principal place
17 of business. I do not recall that plaintiff's attorney, Mr. Bailey, lodged any complaint about
18 traveling to Memphis for that deposition. There were no disputes in the course of that deposition
19 (which lasted about two hours) no calls to the Court, and no appearances before the Court as a result
20 of the deposition.

21 9. I either took or defended the majority of the depositions in the *Joarnt* matter,
22 including the first deposition of Mr. Dessem, and Mr. Bailey represented Plaintiffs in all of those
23 depositions. In those cases where I was not present, I received and reviewed the transcripts. Not a
24 single call was made to the Court to request resolution of a discovery dispute. We never appeared at
25 the Multnomah County Circuit Court to resolve any disputes in any of those depositions.

26 Firmwide:85570401.1 013306.2124

1 10. Mr. Migis testified at his deposition that he quit his job at AutoZone in February,
2 2006.

3 11. I offered, on behalf of AutoZone, to stipulate to Mr. Dessem's prior testimony
4 relating to AutoZone's pay policies and practices regarding payment of final wages. Further, with
5 regard to topics 6 and 7 in the Amended 39C(6) deposition notice (policies, practices and procedures
6 relating to review, correction or adjustment of reported work hours and/or scheduling, tracking or
7 payment of overtime), Plaintiff's counsel previously obtained deposition testimony of several store
8 managers on these subjects. *See*, e.g., Exhibits B, C and D to this Declaration, which are true and
9 accurate excerpts of the deposition testimony of AutoZone Store Managers Suhl and Carrera and
10 District Manager Ken Wesner. AutoZone will also stipulate to this testimony as the Company's
11 policies on correcting or adjusting incorrect time entries and payment of overtime.

12
13 Dated: June ¹⁴16, 2008

14
15 
16 Leigh Ann Tift (OSB No. 54732)
LITTLER MENDELSON
A Professional Corporation

17 Attorneys for Defendant
18 Autozone Inc.

19
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22
23
24
25
26 Firmwide:85570401.1 013306.2124

CERTIFICATE OF SERVICE


I hereby certify that on June 16th, 2008, I served a full, true, and correct copy of the foregoing
**DECLARATION OF LEIGH ANN TIFT IN SUPPORT OF DEFENDANT'S REPLY IN
SUPPORT OF ITS MOTION FOR PROTECTIVE ORDER**

- ☐ By delivery via messenger, or otherwise by hand,
☒ By facsimile,
☐ By e-mail,
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addressed to:

Bailey Pinney & Associates LLC
Attorneys at Law
1498 SE Tech Center Place
Suite 290
Vancouver, WA 98683
Fax (360) 567-3331

Of Attorneys for Plaintiff

By 
Sally Swearingen

Firmwide:85570401.1 013306.2124

EXHIBIT A

1
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5
6 **IN THE CIRCUIT COURT OF THE STATE OF OREGON**
7 **FOR THE COUNTY OF MULTNOMAH**

8 **MICHAEL MIGIS**, on behalf of himself and
9 all others similarly situated,

10 Plaintiffs,

11 v.

12 **AUTOZONE, INC.**,

13 Defendant.
14

Case No. 0711-13531

FIRST AMENDED ORCP 39C(6)
NOTICE OF DEPOSITION OF
DEFENDANT

15 TO: **AUTOZONE, INC.**, by and through your attorney, Ms. Leigh Ann Tift, One Union
16 Square, 600 University Street, Suite 3200, Seattle, WA 98101-3122

17 **PLEASE TAKE NOTICE:** that on **Friday, May 30, 2008**, commencing at **9:00 a.m.**
18 PDT, Plaintiff will take the deposition of Defendant AutoZone, Inc., pursuant to ORCP 39C(6).
19 The deposition will be conducted at 1750 SW Harbor Way, Ste 450, Portland Oregon, or some
20 other local location if agreed upon in advance by the parties. The deposition will be recorded by
21 a licensed and qualified court reporter, and may additionally be recorded by audio/videotape.

22 Plaintiff requests examination relating to the following matters:

- 23 1. All AutoZone policies, procedures, and practices for processing and providing the
24 payment of final wages to all Oregon hourly employees whose employment
25 terminated in any manner with AutoZone between November 16, 2006 and
26 November 16, 2007. See e.g., Defendant's Bates Nos. AZ/MIGIS 0001212 -

1 00001215; and AZ/MIGIS 0001656 - 1836 (and other related documents Defendant
2 will presumably produce under the Court's order during the April 8, 2008 hearing on
3 Plaintiff's *Motion to Enforce Court Order*).

- 4 2. All AutoZone efforts (such as training, seminars, orientation, review of any
5 documents, and reminders or updates – such as memoranda in any form – created,
6 reviewed or used by, or otherwise sent by or to AutoZone managers with actual or
7 apparent authority over any aspect of AutoZone operations in the State of Oregon)
8 to comply with Oregon State laws and regulations governing the payment of final
9 wages to all Oregon hourly employees whose employment terminated in any manner
10 with AutoZone between November 16, 2006 and November 16, 2007.
- 11 3. All performance-based financial incentive(s) and/or compensation AutoZone
12 provided to Oregon Store, District, and/or Regional Manager(s).
- 13 4. All AutoZone termination information relating to Plaintiff Michael Migis, including
14 all material facts relating to his termination from employment, the processing of his
15 final wages, and issuance of his final paycheck.
- 16 5. How time worked by hourly AutoZone employees in the State of Oregon was
17 tracked, recorded, transmitted, and otherwise computed, between April 1, 2005 and
18 November 16, 2007.
- 19 6. All AutoZone policies, practices, and/or procedures relating to the review, adjustment
20 or correction, and approval of Oregon hourly employee time records created between
21 April 1, 2005 and November 16, 2007.
- 22 7. All AutoZone policies, practices, and/or procedures relating to the scheduling,
23 tracking, and payment of overtime wages to hourly employees in the State of Oregon
24 between April 1, 2005 and November 16, 2007.
- 25 8. All AutoZone policies, procedures, and/or practices relating to the scheduling and
26 tracking of hourly employee rest periods in the State of Oregon between April 1,

2005 and November 16, 2007.

9. All AutoZone policies, procedures, and/or practices relating to the scheduling and tracking of hourly employee meal periods in the State of Oregon between April 1, 2005 and November 16, 2007.

10. The document(s) Bates-numbered AZ/MIGIS 0001220 - 1235, and AZ/MIGIS 0001253 - 1288, including the date(s) of creation, identity of all persons involved in the creation, review and/or modification of such document(s), and identification and meaning of all terms, fields, sources of data found therein.

11. The identification (including name and date) and purpose of all reports/queries AutoZone created or obtained from its electronic data relating to the compensation and hours worked by hourly AutoZone employees in the State of Oregon between April 1, 2005 and November 17, 2007.

NOTE: PURSUANT TO ORCP 39C(6), DEFENDANT'S HAS AN AFFIRMATIVE DUTY TO DESIGNATE, PREPARE AND PRODUCE THE PERSON(S) NEEDED TO TESTIFY AS TO THE TOPICS LISTED ABOVE. IF THE PERSON OR PERSONS PRODUCED DO NOT HAVE ADEQUATE KNOWLEDGE TO TESTIFY, PLAINTIFFS WILL SEEK APPROPRIATE REMEDIES, INCLUDING SANCTIONS.

Defendant should, by no later than five (5) business days prior to the date of this deposition, set forth for Plaintiff each person designated and the issue or issues on which such person will testify. The deposition will continue from hour to hour and day to day until complete.

SIGNED this 27th day of April 2008. BAILEY, PINNEY & ASSOCIATES, LLC



A.E. "BUD" BAILEY, OSB 87157
R. BRADLEY GRIFFIN, OSB 072390
CHEY POWELSON, OSB 03551
Attorneys for Plaintiffs

EXHIBIT B

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

RICHARD JOARNT and BERT)
YAMAOKA, individually and)
on behalf of All Persons)
similarly situated,)
 Plaintiffs,)
 vs.)No. 0503-02795
)
AUTOZONE, INC., a)
Foreign Corporation,)
 Defendant.)

DEPOSITION OF DAVID SUHL

Taken in behalf of Plaintiff

Hillsboro, Oregon

November 11, 2005

DEBORAH L. COOK
COURT REPORTING
1102 N. Springbrook Road
No. 136
Newberg, Oregon 97132
(503) 537-0339
deb@cookcourtreporting.com

1 Q Do you have anybody that works for you that
2 does that?

3 A No.

4 Q If I don't want my check to be paid through
5 direct deposit, can I just get a check?

6 A Not that I am aware of.

7 Q Paragraph 4 says, "If an employee forgets to
8 clock in or clock out, employees can bring this to
9 my attention during the workday and I can clock
10 them out and make the note in the records." Can
11 you also clock an employee in?

12 A No. I don't have their password.

13 Q So you can -- can you override an
14 individual's time records so you can change it?

15 A Yeah.

16 Q How do you do that?

17 A I go under the payroll menu in the computer.
18 If they say they forget to clock in, obviously we
19 give them the benefit of the doubt and see what
20 time they are supposed to start, or what time they
21 say they started and make an adjustment.

22 Q Same thing goes with somebody that doesn't
23 clock out?

24 A Right.

25 Q You indicated in here, the second thing, "If

1 a store closes without an employee clocking out,
2 the computer automatically clocks them out at that
3 time."

4 Does that mean that the computer
5 automatically clocks out when --

6 A Yeah, when it does the end-of-day
7 processing, and it processes, it will clock them
8 out. And what happens is we get a report. We see
9 a report of the hours, and we know we're out of
10 line, and that's when we have to go in and make the
11 adjustments and contact the employee, and say what
12 time did you leave.

13 Q So if the employee doesn't clock out, the
14 computer locks them out automatically. What
15 triggers that?

16 A What triggers it? When they run the
17 end-of-day processing, there's also end-of-day
18 payroll. They have to run end-of-day payroll. If
19 the management on duty forgets to run end-of-day
20 process or payroll, it can still do the process.
21 And what it does, the time will continue until the
22 next morning. Because then you have to do
23 end-of-day payroll before you can do the opening
24 paperwork.

25 Q So he just remains on the clock?

1 A Technically, yeah. If we close at 9:00, and
2 he's supposed to come in at 9:00 in the morning,
3 there's 12 extra hours of pay. And that has to be
4 adjusted.

5 Q So that shows up on the report, and you can
6 go back in and make a manual adjustment?

7 A Right.

8 Q Is it possible to clock out and stay in the
9 store?

10 A To stay in the store? You can stay in the
11 store all you want after you clock out. But it
12 ain't going to let you process anything, unless you
13 have got somebody's password. And if you have
14 somebody's password, you are violating policy.

15 Q Is it possible for someone to clock out and
16 stay in the store, and then go out of the store and
17 at some other point -- I mean, the fact that you
18 remain in the store off the clock, for example,
19 would just not be recorded. The time record thing
20 isn't attached to the security system?

21 A It's not attached to the individual either,
22 so obviously --

23 Q So essentially if someone clocked out and
24 continued to work, if that occurred -- and I'm not
25 saying it did, but if that did occur, there would

1 A Yeah.

2 Q And then you say down here, "Our orientation
3 process is called Foundations, and is pretty
4 closely scripted. Attached is Exhibit 2 as an
5 example of the orientation script for store
6 managers."

7 Now, when I look at Exhibit No. 2, this
8 Foundation Basics, on page 1 of Exhibit 2, it says,
9 "Foundations Training Facilitator Guide, effective
10 May 2005." Do you see that?

11 A Yeah.

12 Q So this document probably wouldn't be the
13 document that you would have used in October of
14 2003?

15 A No, it is not.

16 Q Let's skip down to paragraph 14. In
17 paragraph 14 you are kind of talking about
18 generally overtime in this paragraph. But I am
19 looking at the beginning of the end of -- excuse
20 me, line 10 and following on line 11, you say, "I
21 do monitor the amount of overtime and try to
22 prevent unscheduled overtime. But anytime an
23 employee has worked overtime, he or she is paid
24 overtime wages." Do you see that?

25 A Yes.

1 Q What is -- when you make this statement in
2 this declaration, is it in reference to anything in
3 particular?

4 A No. It's just, I control overtime as much
5 as possible in my store. Everybody else is
6 different. My store is my store. So I try to
7 follow as close as I probably can not to have
8 overtime. If have I overtime, it has to be
9 approved by me.

10 Q Does this statement have anything to do with
11 either Mr. Joarnt or Mr. Yamaoka?

12 A No.

13 Q Have you ever had an employee -- you go on
14 to state in here that if someone doesn't -- works
15 off the clock and didn't report their time
16 accurately that there would be discipline that
17 would occur. Have you ever had an employee that
18 you had to discipline for working off the clock?

19 A Yeah. One time back in Florida.

20 Q Back in Florida, but not in Oregon?

21 A Not in Oregon.

22 Q Since you have been in Oregon, specifically
23 at the Aloha store, have you had to discipline
24 anybody?

25 A I have not. I will not allow them to work

EXHIBIT C

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

RICHARD JOARNT and BERT)
YAMAOKA, individually and)
on behalf of All Persons)
similarly situated,)
 Plaintiffs,)
 vs.)No. 0503-02795
)
AUTOZONE, INC., a)
Foreign Corporation,)
 Defendant.)

DEPOSITION OF FELIPE CARRERA

Taken in behalf of Plaintiff

Hillsboro, Oregon

November 14, 2005

DEBORAH L. COOK
COURT REPORTING
1102 N. Springbrook Road
No. 136
Newberg, Oregon 97132
(503) 537-0339
deb@cookcourtreporting.com

1 A Well, I don't know if that's truthful. It
2 either gets printed at the end of the night, after
3 the computer has done, has closed and done all of
4 the backup, and all of that, or it gets printed in
5 the morning. I believe it gets printed in the
6 morning, but I'm not certain. I am not there after
7 midnight, and the computer service is spewing all
8 the paperwork.

9 Q Eventually, though, you get time records
10 that are for the week that are in a paper schedule?

11 A Yes.

12 Q Are those the time records that the
13 employees sign?

14 A That's correct.

15 Q On Saturday night when the store is closing,
16 is there a computerized weekly closing that you go
17 through?

18 A That the manager -- that's at that time,
19 yes.

20 Q What is that? What do you do on Saturday
21 night when the store closes to close out the week?

22 A You do the closing tasks, which are the
23 closing of the tills. And then you review an
24 exceptions report. And it states if anybody came
25 in early or late, or didn't do it on time, it

1 reviews that.

2 And then after that it gives you -- you go
3 into -- weekly time, into payroll. And I don't
4 recall now. I haven't closed in such a long time
5 on Saturdays. But it's in payroll and you are
6 going to weekly -- weekly schedule, closing. I
7 think that's the wording of it. Approve it.
8 Anybody can -- it goes through other people,
9 whoever, whatever they worked, and if they worked
10 and you can see right there what their time was.
11 And it gets approved, and that's it. You clock
12 out, and that clocks everybody out, and you hit the
13 last key and you are out.

14 Q When you close, is it the practice that you
15 are supposed to review those documents as they come
16 up? When they tell you what the individuals
17 worked, are you supposed to review those or do you
18 check them and say it's okay?

19 A Well, it's common practice that you can
20 review them. You can see the hours that people
21 worked, yeah.

22 Q Well, what is the policy? Are you supposed
23 to review them? When you okay them, are you
24 supposed to have reviewed them, and okay them as
25 being accurate?

1 A To the best of our knowledge, they are
2 accurate. So we look at the hours that the person
3 has worked, and we approve them.

4 Q So if I am hearing right, the answer to my
5 question is you are supposed to review them to make
6 sure that they are accurate before you approve
7 them?

8 A That's correct.

9 Q When you closed, did you do that?

10 A Yes, I did.

11 Q Now, people who close for you, your
12 employees, have you instructed them that that is
13 what they are supposed to do?

14 A To a certain extent.

15 Q What part of the policy or practice did you
16 tell them that they don't have to do?

17 A They have to approve the weekly schedule.
18 And they can review it, but there's no -- to my
19 understanding, what I told them was not to -- they
20 are not authorized to change any hours. Only I can
21 do that. Only the manager is authorized to change
22 the hours for any person or persons. So they
23 approve it, they can review it, and they can
24 approve it and send it out and close the night.

25 Q Let's suppose they review it, and somebody

1 forgot to punch out, and there's an exception code
2 that comes up. What are they supposed to do with
3 that?

4 A It doesn't come out.

5 Q I am sorry. What doesn't come out?

6 A An exception.

7 Q Well, why would they -- have you --

8 A We're talking about the end of the week,
9 right?

10 Q Exactly. End of the week, yeah. So let's
11 say on Saturday somebody didn't punch out right.
12 They worked -- they worked too many hours or didn't
13 work enough hours. And when that comes up, what
14 can the person who is closing do?

15 A At the time, nothing. Well, they can do a
16 lot -- they can do it, but the Auto Zone policy
17 says that only the manager can override at any
18 time.

19 Q So they can't override. Do they review it
20 and leave it for you to fix then?

21 A That's correct.

22 Q So they are supposed to review this stuff so
23 anything that comes up they would know about, and
24 then you would be able to fix it when you come in
25 the next day or Monday?

1 A Uh-huh, yes.

2 Q Do you work on Sundays? Do you come in on
3 Sundays?

4 A Not regularly.

5 Q So when you fix something like that from
6 Saturday, you would do that on Monday?

7 A That's correct.

8 Q Has that ever happened, the example I have
9 given you, where you come in on Monday and you have
10 to override something?

11 A Yes.

12 Q And is it generally when you have to come in
13 on Monday and do the override, has the PSM that
14 closed on Saturday made a note to you to let you
15 know that something was amiss and you have to fix
16 it?

17 A Yes.

18 Q Now, on the Saturday closing, how many
19 people have to be in the store while this is all
20 taking place?

21 A Two minimum.

22 Q Can these individuals -- let us say there's
23 three in the store.

24 A Uh-huh.

25 Q Can the third person just go home and not be

EXHIBIT D

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

RICHARD JOARNT and BERT)
YAMAOKA, individually and)
on behalf of All Persons)
similarly situated,)
 Plaintiffs,)
 vs.)No. 0503-02795
)
AUTOZONE, INC., a)
Foreign Corporation,)
 Defendant.)

DEPOSITION OF KENNETH WESNER

Taken in behalf of Plaintiff

Portland, Oregon

September 20, 2005

DEBORAH L. COOK
COURT REPORTING
1102 N. Springbrook Road
No. 136
Newberg, Oregon 97132
(503) 537-0339
deb@cookcourtreporting.com

1 A No, sir.

2 Q And meal breaks are recorded how?

3 A By clocking in and out.

4 Q Is there any other method in Oregon to
5 record meal breaks that you are aware of?

6 A Not that I am aware of.

7 Q And in California, then, it would be a
8 handwritten log, also, for meal breaks, or is
9 that also by clocking in and out?

10 A Clocking in and out.

11 Q So in California there would be a meal
12 break log -- excuse me, a rest break log?

13 A That's correct.

14 Q And then the meal breaks would be based
15 on the computer clock in and clock out?

16 A That's correct.

17 Q Look at the next section. It talks
18 about overtime. It says, "You may be required
19 overtime." And then it says, "All overtime,"
20 and there's a bullet, "must be approved by the
21 store or district manager."

22 In all practicality, do you, as a
23 district manager, approve overtime?

24 A I do.

25 Q On an individual basis?

1 A On an individual basis depending on the
2 store.

3 Q How does that work?

4 A Normally the store will call me if they
5 anticipate running into any kind of overtime,
6 and I will try to work out another solution if
7 I can. And if I can't, we will run the
8 overtime.

9 Q So store managers essentially -- let me
10 strike that. When does the store manager know
11 that he needs to call you to get approval of
12 his overtime?

13 A When -- well, let me back up a little
14 bit. It can be either one. I can only speak
15 for my district. I can't speak for the other
16 districts. The store manager is ultimately
17 responsible for that overtime. So the store
18 manager, if it's been set up with the store
19 manager and the district manager, communicate
20 that prior to usage, that's one thing. That is
21 the way it is in my district, is to control the
22 overtime that way. If it's not, then the store
23 manager makes the ultimate decision at that
24 time.

25 Q In your district, just speaking for your

1 district, does a store manager have authority
2 to approve overtime without giving you --
3 getting your authorization?

4 A Sure. Under certain circumstances,
5 sure. If they can't get ahold of me, or if
6 it's something that is just unforeseen.

7 Q When you say unforeseen, someone gets
8 sick and they have to man the store?

9 A Ultimately I like to be involved in the
10 decision if it's going to require a certain
11 number of hours. If we're talking about a half
12 hour, 45 minutes, no.

13 Q Half hour, 45 minutes per day, or half
14 hour, 45 minutes per week?

15 A No, it would be per day, if that would
16 be the case. I would leave that up to the
17 manager.

18 Q And how is the overtime recorded in
19 terms of the authorization? Is there
20 something -- is there a log that is kept that
21 authorizes the overtime?

22 A No.

23 Q Look over at AZ 000183, and it's page 46
24 of the document itself.

25 A (Complies.)

1 Q Do you see that -- are you on that page?

2 A Yes, I am.

3 Q Down at the bottom where it talks about
4 time records --

5 A Okay.

6 Q -- there's a provision there that says,
7 "Your responsible -- responsibilities related
8 to time records are listed below." I will read
9 that again so the record is clearer. "Your
10 responsibilities related to time records are
11 listed below."

12 And then the first bullet says, "Clock
13 in and out when you report to and leave work."
14 Do you see that?

15 A I see that.

16 Q And then the next one says, "Clock in
17 and out for your meal break." Do you see that?

18 A I see that.

19 Q Is there any other reason that an
20 employee would clock in and out that is set out
21 in the policy manual that is required by the
22 company?

23 A For them to clock in and out?

24 Q Yes.

25 A No, not that I am aware of.

1 Q Are you aware of any practice to have
2 people clock in and out for several minutes at
3 a time because they might be out smoking, or
4 doing something besides working?

5 A Oh, absolutely not.

6 (Deposition Exhibit No. 3 was
7 marked for identification.)

8 Q BY MR. BAILEY: Handing you what we have
9 marked as Exhibit No. 3. Once again, it's
10 entitled at the top, Auto Zone, Inc., SMS
11 Payroll, SMS Time Final Historical Report.

12 Is this the same type of computerized
13 document that we looked at in the first exhibit
14 we looked at?

15 A It is.

16 Q This is for employee Bert Yamaoka. Do
17 you see that?

18 A Yes, I do.

19 Q I am going to look at the time record,
20 which is the third time record down, and it
21 starts out, Store 2203, and it's for October 19
22 of 2004.

23 A I see that.

24 Q It shows that he clocked in at 12:53 and
25 he clocked out at 17:04. Do you see that?

1 reports is a summary for the actual store
2 hours, and then it breaks it down to individual
3 hours for each person.

4 And on that sheet there's a spot for
5 that person, the employee to sign. They are
6 required to sign that and verify the hours. If
7 there's no change, or if they have not -- if
8 they agreed to those, then they obviously move
9 on.

10 If they don't agree, they have until
11 Monday to notify the manager to make any
12 changes in the system.

13 Q And if there is a mistake, the manager
14 would immediately correct that?

15 A Exactly. They go into what they call
16 adjustment to payroll.

17 Q And any overtime hours are also checked
18 on these records, as well?

19 A Oh, absolutely.

20 Q So there's no way an employee could work
21 overtime, and not have those records showing,
22 those overtime hours?

23 A If he's clocked in and out properly,
24 absolutely.

25 Q And what is the overtime policy and

1 practice?

2 A Overtime, anybody that -- the length of
3 anything over eight hours in a 40-hour work
4 week is overtime, period. And we pay, we
5 don't -- you know, we don't have anybody work
6 off the clock, that I am aware of, and that's
7 not a policy of Auto Zone.

8 Q So if an employee works more than 40
9 hours in a given work week, he or she would be
10 paid overtime?

11 A Absolutely.

12 Q What are overtime --

13 A Time and a half.

14 Q If an employee is asked to deliver parts
15 to another store, or perform any other work
16 business, would they be on the clock or be paid
17 for that time?

18 A Oh, absolutely. Yeah.

19 Q You mentioned earlier that lunch periods
20 are scheduled on the weekly schedule. Where is
21 that posted?

22 A Well, when you make up the schedule, the
23 schedule prints out quite a few different
24 reports. And one of those reports is called
25 the daily coverage report. That is to be

1
2 **IN THE CIRCUIT COURT OF THE STATE OF OREGON**
3
4 **FOR THE COUNTY OF MULTNOMAH**

5
6 MICHAEL MIGIS, individually, and on
7 behalf of all other persons similarly
8 situated,

9 Plaintiff,

10 vs.

11 AUTOZONE INC., a Nevada
12 Corporation,

Defendant.

No. 0711-13531

**DECLARATION OF MARK DESSEM IN
SUPPORT OF DEFENDANT'S MOTION
FOR A PROTECTIVE ORDER**

13 I, MARK DESSEM, declare as follows:

14 1. I make this declaration in support of Defendant's Motion for a Protective Order. I
15 have personal knowledge of the facts set forth below, and could competently testify thereto.

16 2. I am an employee of Defendant AutoZone, Inc. ("AutoZone"), where I have worked
17 for more than twenty-six years. I presently hold the position of Director of Payroll.

18 3. As the Director of Payroll, I am responsible for the management, collection, and
19 maintenance of payroll data and the production of payroll payments. I am responsible for payroll for
20 all of the United States and Puerto Rico, including all of AutoZone's subsidiary corporations.

21 4. I have a staff of approximately eighteen people. Together, we are responsible for
22 producing a timely and accurate payroll each period for more than 55,000 AutoZone employees.

23 5. I am ultimately responsible for ensuring that payroll is timely and correct.
24 Consequently, it is important that I be in the office each day to ensure that everything is running
25 smoothly and address any problems that may arise.

1 6. This summer is an especially busy time for me at work, and it would be very
2 disruptive for me to have to travel cross-country for a deposition. We just implemented a new
3 version of our payroll system and, as a result of that, there are still issues that I am addressing
4 concerning the upgrade on a daily basis.

5 7. Also, we are about to put in a new time and attendance system in the stores. This
6 system is what employees will use to clock in and clock out, and the entire payroll department is
7 very busy preparing for this installation. I will personally be heavily involved in this process for the
8 next several months, and it would be difficult for me to be out of the office during that time.

9 8. The end of that second quarter is June 30th, and there is unique quarter end work that
10 has to be done in the month of July. Also, the fiscal year end is on August the 31st, and there is a
11 great deal of work that I need to do before and after that happens to ensure that everything runs
12 smoothly.

13 9. Because I am ultimately responsible for payroll, it is important that my staff and
14 others be able to reach me and that I be able to do work if necessary.

15 10. Traveling to Portland from my residence in Cordova, Tennessee, to be deposed would
16 be a three day trip, and three days absent from work. I do almost all of my work in my office, and
17 almost never travel for business.

18 11. I do have a laptop, but I mostly only use it for emergencies, and I don't have access to
19 all of the information that I need to do my job via the laptop.

20 12. I have previously testified in the predecessor to this case, *Joarnt v. AutoZone*. The
21 plaintiffs' attorney in that case, who I am told is the same attorney in this case, came to Memphis,
22 where I work and where AutoZone has its principal place of business, to take my deposition. That
23 deposition was less than two hours long.

CERTIFICATE OF SERVICE

I hereby certify that on June 16, 2008, I served a full, true, and correct copy of the foregoing
**DECLARATION OF MARK DESSEM IN SUPPORT OF DEFENDANT'S MOTION FOR A
PROTECTIVE ORDER**

- ☐ By delivery via messenger, or otherwise by hand,
☒ By facsimile,
☐ By e-mail,
☒ By mailing same, postage paid, addressed to:

Bailey Pinney & Associates LLC
Attorneys at Law
1498 SE Tech Center Place
Suite 290
Vancouver, WA 98683
Fax (360) 567-3331
Of Attorneys for Plaintiff

By 
Sally Swearingen

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR Multnomah COUNTYDivision - 1021 SW 4th Ave, Portland, OR 97204
(court's address and phone number)

Case name:

Plaintiff Name

Michael Migisv. AutoZone, Inc.

1st Defendant Name

CASE No.

0711-13531UTCR 2.110 AFFIDAVIT, REQUEST TO
REDACT PROTECTED PERSONAL
INFORMATION FROM DOCUMENT EXISTING IN
CASE FILE

IMPORTANT NOTE TO PERSON COMPLETING THIS AFFIDAVIT: Except as specifically ordered by a court, this affidavit and UTCR Form 2.100.4b **cannot be used for contact information** (addresses, telephone numbers, employer identification, and similar information that can be used to contact someone, see UTCR 2.110). The type of information that can be protected by this form is limited to what is listed in UTCR 2.100.

To the court: By this affidavit under UTCR 2.110, I request that the protected personal information in the form attached to this affidavit be redacted from a document in the case file for the case noted above that the general public can see.

The protected personal information I request to be segregated is as follows:

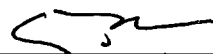
A. The following is a general description of the protected personal information (example description: "my social security number" or "father's bank account number"). Do not include specific protected personal information here.	B. The following is the legal authority by which I believe this information may be exempt from public inspection (cite to statute, rule, case, etc.). Row numbers correspond to those in column A. Add rows in both columns as necessary.
1. <u>Michael Migis' social security number</u>	1. UTCR 2.100 <u>stipulated protective order, signed by Judge Mauer on 5/27/08</u>
2.	2. <u>see attached</u>
3.	3.
4.	4.

PERSON MAKING REQUEST MUST COMPLETE ALL THE FOLLOWING AS INDICATED:

1. (Initial to confirm) CKP. The specific protected personal information described above is provided on the attached UTCR 2.100 segregated information sheet.
2. The specific protected personal information is in the document in the case file that the following identifies:
 - a. Case file number where found: 0711 - 13531 Dec 20 Tiff re Def's Opp. to PIP's 2nd Mot. to Compel
 - b. Description of document containing the information: SMS Time Final Historical Report.
 - c. Page number (identification) of the page(s) containing the information: Pages 1-28 Exh. 1
 - d. A copy of the object page(s) showing specifically the information to be redacted is attached (required):
☒ Yes ☐ No
3. I have attached the required fee of \$ 1 per page for all of the 2 (number of pages) pages I have requested be redacted for a total amount of \$ 21⁰⁰ (total amount of check or money order attached).
☒ Yes ☐ No
4. I (initial one) CKP have OR _____ have not attached a self-addressed, stamped postcard with language required by UTCR 2.110 so that the court can inform me of its response to this request.
5. (Initial to confirm) CKP. I understand that while the protected personal information may be withheld from the general public if this request is granted, it may still be available to some persons and government agencies for purposes described in UTCR 2.100.
6. (Initial to confirm, write "na" if not applicable) N/A. If this document was prepared by someone who is not an attorney, I have attached a completed document preparation certification that applies to both this affidavit and the attached form as required by UTCR 2.010(7).
7. (Initial to confirm) CKP. I have mailed or delivered copies of this request (not including the attached UTCR Form 2.100.4b and its attachments) to the persons required by UTCR 2.080.

I hereby declare that the above statement, the attached information sheet, and any attachments to the information sheet are true to the best of my knowledge and belief, and that I understand it is made for use as evidence in court and is subject to penalty for perjury.

Date 20 June 2008
 OSB# (if applicable) 035512

Signature 
 Type or print name Cheryl Towelson

For office use:

Segregation _____ granted OR _____ denied (state reason) _____

Date: _____

TRIAL COURT ADMINISTRATOR
 By _____

CERTIFICATE OF SERVICE

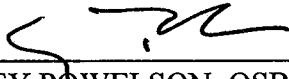
I hereby certify that I caused to be served the foregoing **UTCRC 2.110 Affidavit - Request to Redact Protected Personal Information from Document Existing in Case File** upon:

Ms. Leigh Ann Tift
Littler Mendelson
One Union Square
600 University St, Ste 3200
Seattle, WA 98101

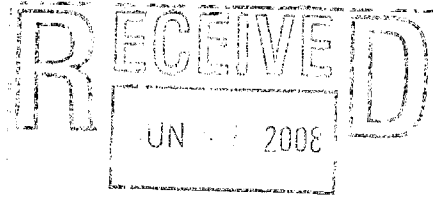
by the following indicated method or methods:

[X] by **mailing** a full, true, and correct copy thereof in a sealed, first-class postage-prepaid envelope, addressed to the person as shown above, the last-known office address of the person, and deposited with the United States Postal Service at Vancouver, Washington on the date set-forth below.

DATED: June 20, 2008



CHEY POWELSON, OSB 035512
Of Attorneys for Plaintiff



**IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH**

MICHAEL MIGIS, individually, and on
behalf of all others similarly situated,

Plaintiff,

v.

AUTOZONE, INC.,

Defendant.

Case No. **0711-13531**

**REPLY SUPPORTING
PLAINTIFF'S MOTION TO BIND
AND/OR COMPEL ORCP 39C(6)
DEPOSITION ANSWERS**

Date: **July 11, 2008**

Time: **1:30 p.m.**

Court: **The Hon. Jerome LaBarre**

I. INTRODUCTION

PLAINTIFF MICHAEL MIGIS hereby requests that the Court grant all relief requested
in his *Motion* because:

1. Defendant offers no justification why it failed to answer questions relating to either
(a) its denials to the Requests For Admission, or (b) the meaning of the information
set forth in the Excel summary report.
2. Defendant fails to justify why its instructions not to answer were appropriate.
3. Defendant fails to distinguish between information prepared in anticipation of
litigation, and information prepared or arising from the normal course of business.

II. POINTS & AUTHORITIES

A. Overview

AutoZone did not adequately prepare its May 15 designee for any of the deposition
topics, including those seeking inquiry into: (a) facts and documents upon which Defendant relied

**REPLY SUPPORTING PLAINTIFF'S MOTION TO BIND AND/OR COMPEL ORCP 39C(6)
DEPOSITION ANSWERS**

BAILEY PINNEY & ASSOCIATES LLC

Attorneys at Law

1498 SE Tech Center Place, Suite 290 • Vancouver, Washington 98683

(360) 567-2551 • Fax (360) 567-3331

1 to deny Plaintiff's Requests For Admission, and (b) the meaning of the Excel summary report
 2 termination codes. The Court should overrule Defendant's instructions not to answer, and bind
 3 AutoZone to its own failures to answer questions on those topics.

4 Moreover, it is well-settled that Oregon's work product "rule protects only those things
 5 which are prepared in 'anticipation of litigation' and not those prepared in the regular course of
 6 business." *United Pacific Ins. Co. v. Trachsel*, 83 Or App 401, 404, rev. denied, 303 Or 332
 7 (1987).

8 AutoZone's ignores not only this fundamental point, but also the conclusions set forth
 9 in the very case law it cites. For example, the *Ecrix* court concluded that "[t]he information
 10 sought [in plaintiff's 30(b)(6) notice] * * * relates to facts which [defendant] has in its possession
 11 which led it to make its threats of patent infringement and to file a counterclaim for patent
 12 infringement. Such information is relevant and discoverable and * * * is not protected by the
 13 work-product doctrine." 95 F.Supp.2d 1155, 1158-59 (D.Colo. 2000). As a result, the court
 14 denied the defendant's motion for a protective order. *Id.* at 1159.

15 During its own deposition, AutoZone failed to answer numerous questions regarding
 16 what facts Defendant possesses (or should possess), and which relate to its affirmative defenses.
 17 Those facts, such as knowledge of the good faith dispute between the company and one or more
 18 putative class members, are not facts or information created in anticipation of litigation. Rather,
 19 they are facts arising from AutoZone's normal course of business.

20 A recent Federal Eastern District of Pennsylvania case is almost identical to the
 21 circumstances in this case. In *State Farm Mut. Ins. Co. v. New Horizont, Inc.*, the 30(b)(6)
 22 designee: did not have knowledge of facts underlying the company's claims; had made no inquiry
 23 to other employees, and had conversations only with and received information from counsel; and
 24 was improperly instructed not to answer questions into the facts underlying the corporation's
 25 claims. 2008 U.S. Dist. LEXIS 37571, *5-17 (E.D.Pa. May 8, 2008).

1 After surveying case law on the matter, the *New Horizont* court stated:

2 [T]he vast majority of State Farm's instructions to Bowles not to respond
 3 were improper. * * * [T]he mere fact that counsel for State Farm may have
 4 provided such information to the witness in preparation for the Rule 30(b)(6)
 5 deposition does not convert the information into attorney work product. Were
 6 State Farm's logic followed to its full extent, anytime an attorney is involved
 7 in preparing a Rule 30(b)(6) witness, such preparation would be futile
 8 because the witness would inevitably be precluded from testifying to anything
 9 learned from the attorney. Were this the rule, every Rule 30(b)(6) deposition
 10 in which an attorney was involved in preparing the witness would be doomed
 11 from the start.

12 2008 U.S. Dist. LEXIS at *30-31. The court further noted that "State Farm bears responsibility
 13 for the failure to prepare [the designee] as required by Rule 30(b)(6), in that it did not require him
 14 to confer with employees, review pertinent documents, or at least have more extensive meetings
 15 with counsel." *Id.* *43. The court imposed monetary sanctions and allowed another deposition
 16 of the corporation. *Id.* at *59.

17
 18 **B. The Court Should Overrule Defendant's Instructions Not to Answer Questions**
 19 **Relating to the Facts and Documents Upon Which AutoZone Relied to Deny**
 20 **Plaintiff's Requests For Admission (39C(6) Notice, ¶ 8).**

21 Defendant failed to raise any privilege or work product objections and arguments before
 22 or after the March 7, 2008 hearing on Plaintiff's motion to compel documents supporting
 23 AutoZone's denials to Plaintiff's Requests For Admission Nos. 1 - 3. For the first time during
 24 the May 15 deposition, AutoZone's counsel raised such objections and instructed the designee
 25 not to answer.

1 Those instructions were improper because Plaintiff's questions did not seek privileged
 2 or work product information. Moreover, many of those questions related merely to the existence
 3 of responsive documents. Rule 36B(1) allows such inquiry, and AutoZone's violation of two
 4 Court Orders provides further justification for that inquiry.¹

5 Nonetheless, AutoZone's counsel made instructions not to answer in response to
 6 questions such as:

- 7 1. Q: "Did you look at any documents that were the basis for AutoZone's denial of the
 8 Requests For Admission?" (*Powelson Declaration*, Ex. A, 106:17 - 107:23)
- 9 2. Q: "No one has instructed you with regard to the documents that were used for the
 10 Request for Admissions, I take it?" (*Id.*)
- 11 3. Q: "Did anyone provide you documents that were the basis for denying Request for
 12 Admission[] No. 2?" (*Id.*)
- 13 4. Q: "Do you have an understanding of the facts related to the determination by
 14 AutoZone that they should deny Request For Admission No. 1?" (*Id.*, 117:6-11).
- 15 5. "With regard to Request for Admission No. 1, what other reports were utilized that
 16 you are aware of, that – besides [the Excel summary report] to make a denial of that
 17 [Request]?" (*Id.*, 126:13-25)

18 The only justification AutoZone offers on the issue of the Requests For Admission,
 19 generally, and instructions not to answer is to direct the Court to an evasive deposition answer
 20 that, "when [AutoZone's Payroll Department] get a request for paychecks for the last – you know,
 21 they deal with 50 states. So they are very qualified to tell when everyone gets paid on time, and
 22
 23
 24

25 ¹ Even if this information is nominally privileged or work product, Defendant has put it
 26 at issue in the lawsuit by virtue of its "answers" to Plaintiff's Requests For Admission 1 - 3.

1 we do that very diligently.” *Opposition* at p. 7:14-17 (underline added).²

2 But that testimony undermines AutoZone’s implied opposition to the *Motion to Enforce*
3 *Court Order*: that from the Excel summary report, AutoZone has no idea whether any of those
4 terminating employees were paid on time. See Defendant’s June 5, 2008 *Opposition to Motion*
5 *to Enforce Court Order* pp. 6:12-17; and 7:12-17.

6 Based on Defendant’s lack of justification for instructing the designee not to answer, and
7 for not having raised privilege and work product objections before, during or after the March 7
8 hearing on Plaintiff’s motion to compel, the Court should order AutoZone to answer all questions
9 relating to ¶ 8 of the 39C(6) Notice of Deposition.

10 **C. The Court Should Bind AutoZone to Its Non-Responsive Answers in Response to**
11 **Plaintiff’s Questions Regarding the Content and Meaning of the Excel Summary**
12 **Report (39C(6) Notice, ¶ 9).**

13 Plaintiff’s ORCP 39C(6) deposition topic in Paragraph 9 was clear: to obtain AutoZone
14 testimony on the Excel summary report, including “the form and content of those document(s)
15 (e.g., identification and meaning of all fields, * * * and the definition of all PeopleSoft Action
16 Codes).” Those Action (termination) Codes include “quit with notice,” “quit without notice,” and
17 “job abandonment,” which are relevant to determining class certification and liability.

18 Despite AutoZone’s claims that it did not knowingly pay any putative class member their
19 final wages in an un-timely manner and is unaware of any instance in which it did, the May 15
20 AutoZone designee – with coaching from AutoZone counsel – testified he had no idea what the
21 company’s own termination codes meant. Instead he speculated that only the store managers
22

23 ² Somewhat inconsistently, the designee also testified he could not tell from the other
24 Court-ordered documents (upon which AutoZone purportedly relied upon to deny Plaintiff’s
25 Requests For Admission) whether certain employees were paid on time at termination. See e.g.,
26 *Powelson Decl.*, Ex. A (pp. 111:22 - 112:8; 112:24 - 113:13; 114:9-16; 115:6-22; 120:9 - 121:19;
131:11-25; 129:25 - 132:3; 134:14 - 135:1; and 139:3-18). See also *Reply Declaration of Chey*
K. Powelson, Ex. A (Exhibit 5 to the May 15 deposition).

1 would know. This is entirely inconsistent with the intent of Rule 39C(6): to prevent the designee
 2 from feigning ignorance of the corporation's own documents and events, and instead referring
 3 to others within the corporation who would know.

4 While this could have been AutoZone's tactical decision instead of a simple failure to
 5 prepare the witness, the result is the same: the responses were failures to answer under ORCP
 6 46A, and arguably constituted a failure to appear under ORCP 46D.

7 The Court should therefore bind AutoZone to the following answers:

8 1. Q: "And what does quit with notice mean?" * * * "How much notice would they
 9 [the employee] give?"

10 A: "**I would not know.**" (*Powelson Decl.*, Ex. A, p. 91:13-20).

11 2. Q: "Do you use quit with notice for individuals who come in on the last day they
 12 work and say, 'I am quitting today?'"

13 [Defendant's counsel objected it called for speculation]

14 A: "**I do not know.**" (*Id.*, p. 93:22 - 94:2).

15 3. Q: "[W]here we have someone who has A-1 [on the Excel summary report] by their
 16 name where is says, quit with notice, would that quit with notice * * * be triggered
 17 by somebody giving more than 48 hours' notice or giving 48 hours' notice?"

18 [Defendant's counsel objected it called for speculation]

19 A: "**I would not know.**" (*Id.*, p. 96:8-15).

20 4. Q: "So what is the difference between quit without notice and job abandonment?"

21 [Defendant's counsel objected it was vague and called for speculation]

22 A: "**I would not know that.**" (*Id.*, p. 97:8-12).

23 5. Q: "Do you know if a manager called you up and said, 'I have got somebody who
 24 came in today and said, I quit, I am not coming in to work,' would that be a quit
 25 without notice?"

1 [Defendant's counsel objected that it was vague and called for speculation]

2 A: "I would not know that." (*Id.*, p. 97:13-20).

3 6. Q: "If a person calls up , and/or doesn't show up for work and they just don't come
4 back, would that be job abandonment?"

5 [Defendant's counsel objected that it was vague and called for speculation]

6 A: "I do not know." (*Id.*, Ex. A, p. 97:21 - 98:2)

7 Binding AutoZone to these answers will mean that Defendant cannot later offer
8 contradictory testimony. Cf. *United States v. Taylor*, 166 F.R.D. 356, 362 (M.D.N.C. 1996) ("[I]f
9 a party states it has no knowledge or position as to a set of alleged facts or area of inquiry at a
10 Rule 30(b)(6) deposition, it cannot argue for a contrary position at trial without introducing
11 evidence explaining the reasons for the change.").

12 If the Court declines to bind AutoZone to this testimony, then Plaintiff requests the
13 opportunity to, at Defendant's sole expense, re-depose AutoZone in Oregon on these questions
14 and the meaning of the other termination codes. ORCP 46D; ORCP 46A.

15 **D. The Court Should Either Bind AutoZone or Order That it Provide Complete**
16 **Answers to Plaintiff's Questions Into the Affirmative Defenses.**

17 AutoZone's *Opposition* ignores the fact-based questions Plaintiff asked during the May
18 15 deposition.

19 The attorney-client privilege does not protect facts, and "where a document may be
20 insulated from discovery because of the work product doctrine, the facts contained therein must
21 be disclosed in response to a properly worded * * * deposition question." *Protective Nat'l Ins.*
22 *Co. v. Commonwealth Ins. Co.*, 137 F.R.D. 267, 279-80 (D.Neb. 1989). "The courts have
23 consistently held that the work product concept furnishes no shield against discovery * * * of the
24 facts that the adverse party's lawyer has learned, or the person from whom he has learned such
25 facts, or the existence or nonexistence of documents, even though the documents themselves may

1 not be subject to discovery.” *Id.* at 280-81 (cite omitted). Thus, “[i]t is no answer to say that the
 2 facts constituting the basis for the conclusionary allegation are within the knowledge of counsel.”
 3 *Protective* at 281 (internal cite omitted).

4 By means of the 39C(6) deposition, Plaintiff sought to discover the facts upon which
 5 AutoZone relies to affirmatively contend that: (1) AutoZone has at all times treated the putative
 6 class members in good faith, and did not knowingly or carelessly fail to pay those members all
 7 wages due and owing; and (2) the class members are estopped from recovering damages because
 8 they failed to report compensable time.

9 During the deposition the AutoZone designee could not offer facts supporting those
 10 contentions, in part because the designee had not made any inquiry into the matter. See e.g.,
 11 *Powelson Decl.*, Ex. A (p. 63:6-16).

12 This does not mean there are no facts relating to the affirmative defenses. For example,
 13 a subjective claim of good faith that all wages have been paid is not purely a legal contention.
 14 Presumably in response to class certification and summary judgment, Defendant will set forth
 15 facts and circumstances arguing why it believes Plaintiff Migis received his final wages timely,
 16 and why Plaintiff Migis is not entitled to any additional compensation.³

17 Moreover, Oregon case law is clear: a party pleading estoppel as an affirmative defense
 18 has “the burden to prove each element of that defense. Estoppel requires reasonable reliance on
 19 the part of the party claiming its protection.” *Kahl v. Pool*, 47 Or App 43, 49 (1980). “[T]he
 20 doctrine only protects those who materially change their position in reliance upon another’s acts
 21 or representations.” *Id.* See also *Guardian Mgmt., LLC v. Zamiello*, 194 Or App 524, 530 (2004)

22
 23 ³ See e.g., *Wales v. Walt Stallcup Enters.*, 167 Or App 212, 214-17 (2000) (discussing
 24 facts relating to final payment of wages, and surveying case law regarding an employer’s burden
 25 to pay final wages); *Wyatt v. Body Imaging, PC*, 163 Or App 526, 531-32 (1999). Cf. *Lauderdale*
 26 *v. Eugene Water & Elec. Bd.*, 217 Or App 551, 565-67 (2008) (“Whether an accord and
 satisfaction exists depends on the intent of the parties as ‘determined from all the circumstances
 attending the transaction.’” (internal cite omitted)).

1 (“To constitute an equitable estoppel, or estoppel by conduct, (1) there must be a false
 2 representation; (2) it must be made with knowledge of the facts; (3) the other party must have
 3 been ignorant of the truth; (4) it must have been made with the intention that it should be acted
 4 upon by the other party; and (5) the other party must have been induced to act upon it.” (internal
 5 cite and quotes omitted)). This is, in part, a factual inquiry.

6 Thus, AutoZone cannot on the one hand claim with its Third Affirmative Defense that
 7 the class members are estopped from recovering damages because they failed to report
 8 compensable time, but then on the other hand refuse to offer facts supporting that defense. Such
 9 tactics are contrary to the spirit and intent of the discovery rules.

10 Since AutoZone could not explain its good faith belief, or how it reasonably relied upon
 11 or knew whether the putative class failed to report time worked, then AutoZone should be bound
 12 to its non-responsive answers as follows:

13 1. Q: “[D]o you have any understanding of whether or not Mr. Migis failed to report
 14 compensable time?.”

15 A: “No.” (*Powelson Decl.*, Ex. A, pp. 64:25 - 65:3).

16 2. Q: “Do you have any independent understanding, or any understanding that you
 17 learned through some sort of inquiry, that during the class period there were
 18 employees who did not report their time appropriately?.”

19 A: “No, I don’t have that information.”

20 Q: “Do you have information that Mr. Migis failed to properly report his
 21 compensable time?”

22 A: “No, I don’t.”

23 Q: “Do you have any understanding that employees, Mr. Migis himself or members
 24 of the class that he is seeking to represent, failed to properly report their compensable
 25 time?”

1 A: "No, I am not aware of that." (*Id.*, pp. 74:7-24; and 79:7-11).

2 3. Q: "If someone fails to report compensable time, does AutoZone have a practice or
3 policy to discipline employees who failed to report all time they work?"

4 [Defendant's counsel objected to it as vague.]

5 A: "I'm not aware of that."

6 Q: "You are not aware of any practice or procedure that would require discipline?"

7 [same objection]

8 A: "I would not know that." (*Id.*, p. 79:12-21).

9 4. Q: "[W]hile not admitting that wages are owed, but if AutoZone were to say, 'If I did
10 owe wages to Mr. Migis, there is a good faith belief on * * * AutoZone's part, that
11 I don't owe them[,] [y]ou wouldn't know the facts surrounding the good faith believe
12 [sic] that wages alleged to be owed are not owed, correct?'" (internal quotes added).

13 [Defendant's counsel objected that it was vague]

14 A: "I am not aware." (*Id.*, p. 80:11-20; see also pp. 80:21 - 81:2).

15
16 **III. CONCLUSION**

17 Plaintiff respectfully requests the Court either bind AutoZone to its non-responsive
18 answers, or order AutoZone to appear for deposition in Oregon within five (5) business days of
19 hearing on this matter to give complete and non-evasive answers to the questions at issue.

20
21 DATED this 23rd day of June 2008.

BAILEY, PINNEY & ASSOCIATES, LLC

22
23 
24 _____
CHEY POWELSON, OSB 03551
Attorneys for Plaintiff

25
26
Page 10 - **REPLY SUPPORTING PLAINTIFF'S MOTION TO BIND AND/OR COMPEL ORCP 39C(6)
DEPOSITION ANSWERS**

CERTIFICATE OF SERVICE

I hereby certify that I caused to be served the foregoing *Reply Supporting Plaintiff's Motion to Bind and/or Compel ORCP 39C(6) Deposition Answers* upon:

Leigh Ann Tift
Littler Mendelson
One Union Square
600 University St, Ste 3200
Seattle WA 98101-3122
Attorney for Defendant AutoZone

by the following indicated method or methods:

☒ by causing a full, true, and correct copy thereof to be **deposited in the U.S. mail service** to the person listed above on the date set forth below.

DATED June 23, 2008

BAILEY, PINNEY & ASSOCIATES, LLC



CHEY POWELSON, OSB 035512
Attorney for Plaintiff

REPLY SUPPORTING PLAINTIFF'S MOTION TO BIND AND/OR COMPEL ORCP 39C(6) DEPOSITION ANSWERS

BAILEY PINNEY & ASSOCIATES LLC

Attorneys at Law

1498 SE Tech Center Place, Suite 290 • Vancouver, Washington 98683
(360) 567-2551 • Fax (360) 567-3331

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5 **IN THE CIRCUIT COURT OF THE STATE OF OREGON**
6 **FOR THE COUNTY OF MULTNOMAH**

7 **MICHAEL MIGIS**, individually and on behalf
8 of all others similarly situated,

Case No. 0711-13531

9 Plaintiff,

**PLAINTIFF'S THIRD MOTION
FOR ORDER COMPELLING
DISCOVERY**

10 v.

11 **AUTOZONE, INC.**,

**EXPEDITED CONSIDERATION
REQUESTED**

12 Defendant.
13

14 **REQUEST FOR ORAL ARGUMENT:** Pursuant to UTCR 5.050, Plaintiff estimates
15 the time needed for oral argument to be 30 minutes. Court reporter services are not required.

16 **UTCR 5.010 CERTIFICATION OF COMPLIANCE:** Plaintiff's counsel certifies he
17 made good faith efforts to confer and did confer with opposing counsel to resolve the issues in
18 this *Motion*, but the parties are unable to reach resolution. See *Declaration of Chey K. Powelson*
19 *Supporting Plaintiff's Third Motion for Order Compelling Discovery* ("Powelson Decl."), ¶ 2.

20 **I. MOTION**

21 **PLAINTIFF MICHAEL MIGIS**, through his attorneys, moves this Court for an order
22 compelling Defendant AutoZone to, within five (5) business days of hearing on this matter,
23 produce the following information: (1) weekly summarization of employee hours reports
24 (*Powelson Decl.*, Ex. A (RFP No. 4)); (2) documents referencing AutoZone's efforts to preserve
25 potentially discoverable documents (*Id.* (RFP No. 9)); (3) documents relating to Defendant's
26 affirmative defense of laches (*Id.* (RFP No. 10)); and (4) a document in electronic Excel format,

1 which Defendant previously produced under Court Order only in .pdf format.

2 II. ARGUMENT & AUTHORITIES

3 A. Plaintiff's Third Set of Requests For Production

4 Defendant responded to Plaintiff's Third Set of Discovery Requests on or about May 5,
5 2008. *Powelson Decl.*, Ex. A.

6 1. Request For Production No. 4 (weekly summarizations of hours worked)

7 a. *Background*

8 Despite conducting a number of discovery conferences on Request For Production No.
9 4, and an express commitment by AutoZone to produce the information at issue, Defendant
10 subsequently declined to produce the information. Request For Production No. 4 sought:

11 [A]ll documents and reports reflecting any weekly summarization of hours
12 worked by AutoZone hourly employees in stores located in the State of Oregon,
13 for the period of time from two (2) years prior to the filing of the Complaint,
14 through the date of that filing.

15 AutoZone did not object that the request was overly broad or unduly burdensome. Instead,
16 Defendant produced one report in electronic format showing only the total number of employee
17 hours worked in each store. *Powelson Decl.*, Ex. B. This was wholly inadequate, and later
18 AutoZone counsel stated it would not stipulate to the authenticity of that report. *Powelson Decl.*,
19 ¶ 3.

20 During a May 8 discovery conference, Plaintiff referred AutoZone counsel to an example,
21 hard copy "Payroll Weekly Hours Summary Report," which expressly shows, by store, each
22 individual employee's hours worked, hours paid, total overtime, and the time spent at the store
23 by hourly-paid AutoZone truck drivers. *Powelson Decl.*, ¶¶ 2, 4, and Ex. C. Defendant did not
24 produce the documents.

25 On June 3 AutoZone's counsel informed Plaintiff, "Defendant has located and is willing
26 to produce reports reflecting weekly summarizations of hours worked by AutoZone employees
as requested in Plaintiff's Third Request for Production No. 4." *Powelson Decl.*, Ex. C-1.

1 The next day, AutoZone's counsel confirmed impending production of the reports, stating:

2 I have documents ready to produce as soon as I get the word from you
3 that the [] [stipulated protective] order has been submitted and signed. * *

4 * The fact is, the weekly summarizations of hours worked report
5 contains social security numbers and other confidential information. If you
6 do not sign and forward the protective order based on my representation
7 that we have documents that are appropriately covered by such order, feel
8 free. The delay, at this point, is due to your refusal to sign the protective
9 order. Not much I can do at this point.

10 *Powelson Decl.*, Ex. D (p. 3) (emphases added). That same day Plaintiff forwarded a copy of a
11 previously-signed Stipulated Protective Order, and requested production of the weekly hours
12 reports. *Id.*, Exs. D (p. 1) and E.

13 By June 19, Defendant still had not produced the weekly summarization reports. Plaintiff
14 again followed up on the anticipated production of the information. *Powelson Decl.*, Ex. F. In
15 response, Defendant's counsel told Plaintiff, "we have already produced documents and answered
16 your questions." *Id.*, Ex. G (p. 4). Plaintiff replied and again requested an update on the
17 production of the weekly hours report. *Id.*, Ex. G (pp. 3 - 4).

18 That next week on June 24 AutoZone's counsel stated, "So * * * unless you can identify
19 what INFORMATION you don't have, I believe we have produced the requested documents *
20 * * ." *Powelson Decl.*, Ex. G (pp. 1 - 2) (capital case original).

21 Plaintiff then again requested on June 25 that Defendant indicate its availability for
22 hearing on a motion to compel either July 31 or August 1 on the issue of the weekly reports.
23 AutoZone's counsel would not provide a date, but instead stated, "It looks to me like we are still
24 conferring. * * * We will get back to you once we have looked into the questions you raise. In
25 the meantime, put your motion to compel back in your pocket." *Powelson Decl.*, Ex. G (p. 1).

26 By the end of that same day, Defendant's counsel faxed Plaintiff a letter setting forth
identical arguments, but did not disclose whether it was available for a hearing on a motion to
compel. *Powelson Decl.*, Ex. M.

1 Plaintiff then communicated additional reasons why AutoZone should produce the weekly
 2 reports as it previously committed, and made a third request for Defendant's availability for
 3 hearing. *Powelson Decl.*, ¶¶ 13 - 14.

4 In an effort to run out the clock before Plaintiff's August 15 deadline for filing a motion
 5 for class certification, on June 26 AutoZone counsel again failed to indicate whether it was
 6 available for a hearing. *Powelson Decl.*, ¶ 14.

7 **b. Argument (RFP No. 4)**

8 The weekly reports are relevant for several reasons. First, they contain information
 9 relating to the wage and hour issues that are the subject matter of this lawsuit, and are categorized
 10 by store, unlike the hourly time records. The reports also show hours "paid," and discrete, total
 11 overtime by employee. This cuts down on the work needed to analyze various aspects of
 12 employee hours worked.

13 In addition, the summarizations expressly reflect the AutoZone truck drivers' time spent
 14 at each store, a topic upon which AutoZone counsel deposed Plaintiff Migis. *Powelson Decl.*,
 15 Ex. C and Ex. H (Migis Dep., pp. 77:24 - 83:23) (Defendant's counsel inquiring into truck driver
 16 work schedules, and their tracking of work start time at the stores). Defendant's own discovery
 17 has made this information relevant.

18 Finally, the weekly reports are relevant because, according to AutoZone's counsel, the
 19 reports contain Social Security Numbers, which can be used to locate witnesses. See p. 4,
 20 Multnomah County Circuit Court's "Civil Motion Panel Statement of Consensus" (November
 21 2, 2004). Cf. ORCP 32F(2)(iii) (allowing a court to direct notice to class members when the
 22 "names and addresses of the class members can reasonable be determined from the defendant's
 23 business records * * *").

24 AutoZone has been "ready to produce" the requested information – and indicated a
 25 willingness to do so – as early as June 4. The Court should therefore order AutoZone to produce
 26 the weekly summarization of hours worked report in electronic format.

1 **2. Request For Production No. 9 (AutoZone efforts to preserve information)**

2 ***a. Background***

3 Plaintiff's Request For Production No. 9 sought: "all documents, reflecting, containing,
4 or otherwise relating to Defendant's efforts to preserve all potentially discoverable information
5 relating to the subject matter of this lawsuit." *Powelson Decl.*, Ex. A.

6 The information sought is relevant because AutoZone has failed to produce all documents
7 as ordered by the Court. This includes the "Termination Reports" (see p. 7, Plaintiff's
8 *Supplemental Briefing Supporting Motion to Enforce Court Order*), as well as all 'Weekly
9 Schedule' reports referencing Plaintiff's work schedule * * *," which the Court on March 7, 2008
10 ordered Defendant to produce. *Powelson Decl.*, Ex. I (April 2, 2008 Order). With respect to the
11 Weekly Schedule reports, Defendant responded that "they are not retained as a matter of practice
12 or policy." *Powelson Decl.*, Ex. J.

13 And in response to other discovery requests, AutoZone has: (a) stated that "documents
14 are not retained for the period requested," and (b) otherwise not produced other responsive
15 documents known to exist. See e.g., *Powelson Decl.*, Ex. A (Third Set, RFP No. 3).

16 ***b. Argument (RFP No. 9)***

17 AutoZone also had difficulty preserving potentially discoverable information in the *Joarnt*
18 *v. AutoZone, Inc.* matter. In that case, upon motion by the plaintiffs setting forth evidence of
19 AutoZone's destruction of potentially discoverable information, Multnomah County Circuit Court
20 Judge Henry Kantor ordered AutoZone to preserve certain categories of information. *Powelson*
21 *Decl.*, Ex. K (Court Order).

22 It is not an unusual proposition for a litigant to seek discovery regarding the efforts an
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opposing litigant took to locate and produce responsive documents.¹

It is also not unusual to request a litigant to timely submit a declaration or signed verifications to discovery responses stating that all responsive, existing documents have been produced.²

Based on AutoZone's inability to produce all discoverable documents in this case, the Court should also: (a) order AutoZone to produce documents relating to its efforts to preserve those documents; (b) order AutoZone to submit a declaration as referenced above; and/or (c) order AutoZone to take affirmative steps to now preserve documents and information, and to inform the Court of those steps. This is even more important in light of AutoZone's recent indication it is now installing a new time-keeping system at AutoZone stores.³

3. Request For Production No. 10 (AutoZone's affirmative defense of laches)

a. Background

Plaintiff's Request For Production No. 10 sought "all documents supporting, refuting or relating to Defendant's Fourth Affirmative Defense (Laches)." Defendant only objected and

¹ See e.g., *In re NTL Sec. Litig.*, 244 F.R.D. 179, 183-085 (S.D.N.Y. 2007); *Cache La Poudre Feeds, LLC v. Land O'Lakes Farmland Feed, LLC*, 244 F.R.D. 614, 619-620 (D.Colo. 2007); and *In re Napster, Inc. Copyright Litig.*, 462 F. Supp. 2d 1060, 1055-56 (N.D.Cal. 2006). Cf. *Doe v. District of Columbia*, 230 F.R.D. 47, 55-56 (D.D.C. 2005) (Court stating, "*** Rule 26(b)(1) may be construed to allow for discovery of document production policies and procedures in allowing 'parties [to] obtain discovery regarding any matter, ... including the existence, description, nature, custody, condition, and location of any ... documents.' Plaintiff may, therefore, request information [under Fed.R.Civ.Pro. 30(b)(6)] as to the 'existence,' 'custody,' or 'condition' of documents, thereby establishing defendant's policies and procedures of document retention and production." (cite omitted)).

² See e.g., *Soto v. City of Concord*, 162 F.R.D. 603, 623 (N.D.Cal. 1995) (ordering defendants to provide "clear and proper verification that the documents, or parts thereof, previously supplied to Plaintiff * * * are all such documents of that kind obtainable by the defense."); and *Norman v. Young*, 422 F.2d 470, 473 (10th Cir. 1970) ("But records which are normally kept in the business of the party, as these were, are presumed to exist, absent a sworn denial * * *").

³ See ¶ 7 of the June 16, 2008 *Declaration of Mark Dessem* offered in support of Defendant's *Motion for Protective Order* ("* * * we are about to put in a new time and attendance system in the stores.").

1 referred Plaintiff to his own documents. *Powelson Decl.*, Ex. A.

2 **b. Argument (RFP No. 10)**

3 “For all forms of discovery, parties may inquire regarding any matter, not privileged,
4 which is relevant to * * * the claim or defense of any other party * * * .” ORCP 36B(1).

5 “Laches depends on the circumstances of each case and will not be ‘applied mechanically
6 to every situation’ merely because a party has acted with neglect. In that sense, laches differs
7 from legal defenses, such as the statute of limitations.” *Hilterbrand v. Carter*, 175 Or App 335,
8 343 (2001). The Oregon State Court of Appeals has also recently recognized that “[t]he
9 importance of discoverable documents to affirmative defenses is a sufficient ground for dismissal
10 as a sanction for failing to produce [them].” *Asato v. Dunn*, 206 Or App 753, 757-58 (2006) (in
11 context of litigant’s failure to produce “relevant information concerning several ‘core issues’ in
12 the case, including defendants’ * * * laches defense[] * * * .”).

13 By asserting a laches defense, AutoZone bears the burden of proving the defense applies
14 under the circumstances of this specific case. This requires demonstration of fact showing why
15 AutoZone is substantially prejudiced by this lawsuit.

16 The Court should therefore order AutoZone to produce all documents responsive to
17 Plaintiff’s Request For Production No. 10.

18 **B. April 2, 2008 Court Order**

19 **1. Background**

20 The Court’s Order on Plaintiff’s *First Motion for Order Compelling Discovery* required
21 AutoZone to produce:

22 [A]ll documents and reports reflecting dates and times when any AutoZone
23 employees working in the State of Oregon missed their meal periods, for [a
24 period of one year as modified by the Court Order]. This Request includes
any and all, if applicable, “Missed Lunch Reports” and “Lunch Variance
Reports.”

25 See *Powelson Decl.*, Exs. I (Order) and J (Plaintiff’s Second Set RFP No. 4) (bold added).

26 AutoZone eventually produced two different documents only in .pdf format, including the one

1 at issue. See *Id.*, Ex. L.

2 During a discovery conference on May 8, Plaintiff requested the current document at issue
3 in Excel format. Defendant's counsel committed to producing it. Then during a subsequent May
4 21 in-person discovery conference, Defendant re-committed to producing the Excel file.
5 *Powelson Decl.*, ¶ 2.

6 Between May 21 and June 19, however, Plaintiff followed up with Defendant's counsel
7 on at least three separate occasions, requesting production. *Powelson Decl.*, Exs. E (p. 2), F, and
8 G (pp. 4 - 5). On June 24, Defendant claimed it had no idea what Plaintiff was asking for. *Id.*,
9 Ex. G (p. 1).

10 Plaintiff again reiterated and identified the specific document, by Bates number, to be
11 produced in Excel format. Defendant claimed it was looking into the issue. *Powelson Decl.*, Ex.
12 G (p. 1).- But later that same day AutoZone counsel simply indicated that the information sought
13 is a "subset" of other Excel information, and so Plaintiff had virtually everything. *Id.*, Ex. M.

14 2. Argument

15 AutoZone is not substantially justified in refusing to produce the information in Excel
16 format because: (a) the Court order requires production of "all" documents and reports; (b)
17 Plaintiff's definition of "documents" includes the information requested; and (c) AutoZone has
18 twice committed to producing the information.

19 A fundamental problem is AutoZone's unwillingness to recognize the Court's order
20 requiring production of all documents and reports. Plaintiff's definition of "documents" further
21 supports the notion that Defendant produce the document in electronic Excel format.

22 The Court has already decided a matter similar to this issue. During the April 22, 2008
23 hearing Defendant's *Motion for Extension of Time*, the Court re-ordered AutoZone to re-produce
24 another .pdf document in Excel format.

25 The Court should order production of the document Bates-numbered 0001220 - 1235..

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III. CONCLUSION

For all the reasons set forth herein, Plaintiff requests that the Court order production of the documents at issue.

DATED this 27th day of June 2008.

BAILEY, PINNEY & ASSOCIATES, LLC


A.E. "BUD" BAILEY, OSB 87157
CHEY POWELSON, OSB 03551
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that I caused to be served the foregoing Plaintiff's *Third Motion for Order Compelling Discovery* upon:

Leigh Ann Tift
Littler Mendelson
One Union Square
600 University St, Ste 3200
Seattle WA 98101-3122
Fax: (206) 447-6965
Attorney for Defendant AutoZone

by the following indicated method or methods:

- ☒ by facsimile transmission to the above-listed fax number.
- ☒ by causing a full, true, and correct copy thereof to be deposited in the U.S. mail service to the person listed above on the date set forth below.

Amy Alpern
Littler Mendelson
1750 SW Harbor Wy, Ste 450
Portland OR 97201
Fax: (503) 914-1816
Attorney for Defendant AutoZone

by the following indicated method or methods:

- ☒ by facsimile transmission to the above-listed fax number.

DATED June 27, 2008

BAILEY, PINNEY & ASSOCIATES, LLC



CHEY POWELSON, OSB 035512
Attorney for Plaintiff

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7 **IN THE CIRCUIT COURT OF THE STATE OF OREGON**
8 **FOR THE COUNTY OF MULTNOMAH**
9

10 **MICHAEL MIGIS**, individually and on
11 behalf of all others similarly situated,

12 Plaintiff,

13 v.

14 **AUTOZONE, INC.**,

15 Defendant.
16
17

Case No. 0711-13531

**DECLARATION OF CHEY K.
POWELSON SUPPORTING
PLAINTIFF'S THIRD MOTION
FOR ORDER COMPELLING
DISCOVERY**

18 I, Chey K. Powelson, hereby declare as follows:

- 19 1. I am one of the attorneys for Plaintiff herein. I am competent to testify in this
20 matter, and base the contents of this declaration on my own personal knowledge
21 and/or the litigation files and documents my firm maintains for this litigation.
22 2. On May 8, 2008, I conferred via telephone with AutoZone counsel Leigh Ann Tift
23 on Defendant's objections and responses to Plaintiff's Third Set of Requests For
24 Production, including Request Nos. 4, 9 and 10. Attached hereto as **Exhibit A** is
25 a true and correct copy of portions of the Third Set of Requests For Production, at
26

1 issue in the instant *Motion*. During that phone conversation I also: (a) referred Ms.
 2 Tift to AutoZone "Payroll Weekly Hours Summary Reports; and (b) received a
 3 commitment from her to produce the meal period reports in Excel format. Then on
 4 May 21, 2008, I conducted an in-person discovery conference with AutoZone
 5 counsel Leigh Ann Tift and Amy Alpern, during which I again referred them to the
 6 weekly hours summary reports. Also on that date Defendant's counsel re-committed
 7 to producing in electronic Excel format the meal period reports previously produced
 8 under Court Order in .pdf format. On or about June 11, 2008, I again conferred with
 9 opposing counsel Tift via telephone regarding production of all meal period reports
 10 in Excel format.

- 11 3. Attached hereto as **Exhibit B** is a true and correct copy of the first page of a
 12 summarization "report" AutoZone produced in Excel format in response to
 13 Plaintiff's Third Set Request For Production No. 4. During a discovery conference
 14 I informed Defendant's counsel that the production was not adequate. In a June 3,
 15 2008 letter from AutoZone counsel, Defendant indicated it would not stipulate to
 16 that report as being authentic.
- 17 4. Attached hereto as **Exhibit C** is a true and correct hard copy version of a "Payroll
 18 Weekly Hours Summary Report[s]" Defendant AutoZone had produced in the 2005
 19 Multnomah County Circuit Court case, *Joarnt v. AutoZone, Inc.* (Case No. 0503-
 20 0275). This report is a matter of public record, filed in the *Joarnt* case.
- 21 5. Attached hereto as **Exhibit C-1** is a true and correct copy of AutoZone attorney
 22 Amy Alpern's June 3, 2008 letter to Plaintiff in which she confirms that AutoZone
 23 will produce "reports reflecting weekly summarizations of hours worked by
 24 AutoZone employees as Requested in Plaintiff's Third Request for Production No.
 25 4. Defendant is willing to produce this information pursuant to the terms of a
 26

1 protective order.” (p. 3). In that same letter Defendant also committed to producing
2 other employee time records.

3 6. On June 4, 2008, I forwarded via e-mail to AutoZone counsel Amy Alpern a signed,
4 Stipulated Protective Order. Attached hereto as **Exhibit D** is a true and correct copy
5 of the first (relevant) page my June 4, 2008 e-mail exchange with Ms. Alpern, in
6 which the “Attachments” line reflect that I sent the Stipulated Protective Order. I
7 also attached a letter to that e-mail, requesting that Defendant produce the weekly
8 reports, as well as the meal period report Bates Nos. AZ/MIGIS 0001220-1235 in
9 Excel format. Attached hereto as **Exhibit E** is a true and correct copy of the June
10 4 letter.

11 7. Attached hereto as **Exhibit F** is a true and correct copy of the first (relevant) page
12 that is my June 19, 2008 e-mail to AutoZone counsel, requesting an update of
13 AutoZone’s impending production of the weekly summarizations of hours reports.

14 8. Attached hereto as **Exhibit G** is a true and correct copy of the first five pages on an
15 e-mail exchange between myself and AutoZone counsel, occurring between June 9
16 and June 25, 2008, in which we discussed Defendant’s non-production of Bates
17 Nos. 0001220-1235 in Excel format, and the weekly summarization of hours
18 reports. It also reflects that on the morning of Monday, June 23, I asked Defendant’s
19 counsel whether they were available for hearing on a motion to compel either July
20 31 or August 1. Defendant did not indicate its availability.

21 9. Attached hereto as **Exhibit H** are true and correct excerpts from Defendant’s
22 deposition of Plaintiff Michael Migis, during which AutoZone counsel Leigh Ann
23 Tift asked Mr. Migis about practices regarding AutoZone drivers’ recording of time
24 worked.

25 ///

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Page 3 -

**DECLARATION OF CHEY K. POWELSON SUPPORTING PLAINTIFF’S THIRD MOTION FOR
ORDER COMPELLING DISCOVERY**

BAILEY PINNEY & ASSOCIATES LLC
Attorneys at Law

1498 SE Tech Center Place, Suite 290 • Vancouver, Washington 98683
(360) 567-2551 • Fax (360) 567-3331

- 1 10. Attached hereto as **Exhibit I** is a true and correct copy of an April 2, 2008 Court
2 Order entered by the Honorable Jerome LaBarre in response to hearing on Plaintiff's
3 First Motion to Compel discovery, and which modifies Plaintiff's Second Set
4 Request For Production No. 4 (see Exhibit J, *infra*) as to time period only. Attached
5 hereto as **Exhibit J** are true and correct portions of Defendant's March 28, 2008
6 First Supplemental Responses to Plaintiff's Second Set of Requests For Production
7 of Documents.
- 8 11. Attached hereto as **Exhibit K** is a true and correct copy of an order issued by the
9 Honorable Henry Kantor in the *Joarnt v. AutoZone, Inc.* case, wherein he ordered
10 AutoZone to preserve all contents of boxes retained at Oregon AutoZone stores.
11 Judge Kantor entered this part of the order in response to a motion brought by
12 plaintiffs in that case, setting forth evidence of AutoZone's destruction of potentially
13 discoverable documents.
- 14 12. Attached hereto as **Exhibit L** are true and correct portions of the .pdf document
15 Defendant produced in response to the Court's April 2, 2008 Court Order to produce
16 all documents responsive to Plaintiff's Second Set of Requests For Production, No.
17 4. Defendant will not produce this document in electronic Excel format, despite a
18 similar issue that arose during the April 22, 2008 hearing on *Defendant's Motion for*
19 *Extension of Time*, in which Judge LaBarre ordered Defendant to produce a .pdf
20 document in Excel format.
- 21 13. Attached hereto as **Exhibit M** is a true and correct copy of AutoZone counsel Leigh
22 Ann Tift's June 25, 2008 faxed letter to Plaintiff's counsel, in which Ms. Tift
23 reiterates that Defendant will not produce Exhibit L in Excel format, nor the weekly
24 summarization of hours worked reports. After receiving this letter, I e-mailed and
25 faxed a response letter, indicating additional reasons why Defendant should produce
26

1 the hours worked reports, and again requested Defendant indicate whether it was
2 available for hearing on a motion to compel either July 31, or August 1.

3 14. As of the end of the day on Thursday, June 26, 2008, despite my three separate
4 requests to Defendant's counsel for their availability for hearing on a motion to
5 compel, counsel had still responded by confirming or denying their availability.
6

7 I HEREBY DECLARE THAT THE ABOVE STATEMENT IS TRUE TO THE
8 BEST OF MY KNOWLEDGE AND BELIEF, AND THAT I UNDERSTAND IT IS
9 MADE FOR USE AS EVIDENCE IN COURT AND IS SUBJECT TO PENALTY
10 FOR PERJURY.

11 Dated this 27th day of June 2008 at Vancouver, Washington.

12 BAILEY, PINNEY & ASSOCIATES, LLC

13 
14 CHEY K. POWELSON
15 Attorney for Plaintiffs
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CERTIFICATE OF SERVICE

I hereby certify that I caused to be served the foregoing *Declaration of Chey K. Powelson* supporting Plaintiff's *Third Motion for Order Compelling Discovery* upon:

Leigh Ann Tift
Littler Mendelson
One Union Square
600 University St, Ste 3200
Seattle WA 98101-3122
Fax: (206) 447-6965
Attorney for Defendant AutoZone

by the following indicated method or methods:

- ☒ by facsimile transmission to the above-listed fax number.
- ☒ by causing a full, true, and correct copy thereof to be deposited in the U.S. mail service to the person listed above on the date set forth below.

Amy Alpern
Littler Mendelson
1750 SW Harbor Wy, Ste 450
Portland OR 97201
Fax: (503) 914-1816
Attorney for Defendant AutoZone

by the following indicated method or methods:

- ☒ by facsimile transmission to the above-listed fax number.

DATED June 27, 2008

BAILEY, PINNEY & ASSOCIATES, LLC



CHEY POWELSON, OSB 035512
Attorney for Plaintiff

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

<p>MICHAEL MIGIS, et al.</p> <p>Plaintiff,</p> <p>v.</p> <p>AUTOZONE, INC.,</p> <p>Defendant.</p>	<p>Case No. 0711-13531</p> <p>(Filed as a Class Action)</p> <p>DEFENDANT'S RESPONSES TO</p> <p>PLAINTIFF'S THIRD SET OF REQUESTS</p> <p>FOR PRODUCTION OF DOCUMENTS</p>
---	--

TO: Defendant AutoZone, Inc., c/o your attorneys Douglas Parker and Neil Olsen, 1750 SW Harbor Way, Ste 450, Portland OR 97201

Plaintiff hereby requests that Defendant make the following documents, as requested in Exhibit "A," available for inspection and copying at the time, date and place set forth below:

TIME, DATE AND PLACE FOR PRODUCTION

TIME: 5:00 p.m.

DATE: April 25, 2008

PLACE: Bailey Pinney & Associates LLC
1498 SE Tech Center Place, Ste 290
Vancouver, WA 98683

///

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EXHIBIT A
Page 1079

DEFINITIONS

a. The term "document" or "documents" as used herein is to be construed broadly and shall mean any kind of hard copy and/or electronic written, recorded or graphic matter in any form of physical media, however produced or reproduced, of any kind of description, whether sent or received or neither, including originals, non-identical copies (whether different from the original because of marginal notes, or other material inserted therein or attached thereto, or otherwise), drafts and both sides thereof, including, but not limited to: agreements, communications, correspondence, telegrams, cables, telex messages, electronic mail messages ("e-mail"), memoranda, records, books, summaries of records or personal conversations or interviews, desk calendars, appointment books, diaries, journals, forecasts, statistical statements, tabulations, accountants' work papers, graphs, charts, accounts, analytical records, affidavits, minutes, records or summaries of meetings or conferences, reports or summaries of interviews or telephone conversations, reports or summaries of investigations, opinions or reports of consultants, appraisals, records, reports or trade letters, press releases, contracts, notes, projections, drafts of any documents, working papers, checks (front and back), check stubs or receipts, sound recordings, data processing records, microfilm, photographs, maps, financial statements or reports thereof, promissory notes, loan agreements, loan files and all notes contained with loan files, revolving credit agreements, deeds of trust, guaranty agreements or indemnification agreements, real estate contracts for sale or lease, pleadings, or any other documents or writings of whatever description, including any information contained in any computer (even if not previously printed out) within the custody or control of you or any of your employees, agents, including attorneys, accountants, investment bankers or advisors, or any other person acting or purporting to act on your behalf.

EXHIBIT A
Page 2 of 9

1 b. Produce all non-identical copies of all responsive documents including copies that
2 bear marks, notations or changes not present on the original.

3 c. If any documents are withheld on grounds of attorney/client privilege or attorney
4 work product immunity, identify the author, each recipient thereof, the nature of the document and
5 the basis upon which the privilege is asserted.

6 d. If any document requested was, but no longer is in the possession, custody, or
7 control of Defendant, or in existence, state whether it (a) is missing or lost, (b) has been
8 destroyed, (c) has been transferred, voluntarily or involuntarily, to others, or (d) has been otherwise
9 disposed of. For each such instance, explain the circumstances surrounding such disposition, give
10 the date or approximate date thereof, and the names and last known home and business addresses of
11 these persons with knowledge of such circumstances.

12 e. "Defendant" as used herein refers to all parties named in this action, and all agents,
13 employees or other persons with an interest in any party.

14 f. These Requests For Production are continuing and, in the event you discover further
15 information that is responsive to them, you must supplement your responses. If you fail to
16 supplement your responses in a reasonable fashion, requestor will move the Court for an order
17 excluding from evidence at trial any matter which is responsive and not furnished.

18 g. The phrase "Electronic Data" includes information from Defendant's computer
19 systems, removable electronic media and other locations. This further includes, but is not limited to,
20 all documents, text files, e-mail and other electronic communication (including logs of e-mail history
21 and usage, header information and "deleted" files), word processing documents, spreadsheets,
22 databases, calendars, telephone logs, fax logs, alarm or security logs or records, video security or
23

24
25
26
EXHIBIT A
Page 3 of 9

1 other tapes or recordings, contact manager information, internet usage files, backup files and tapes,
 2 image files, and network access information. This also includes data on personal, home or laptop
 3 computers of personnel containing potentially discoverable information. With respect to all of the
 4 above, produce the data in native file format with any metadata intact.

5 6 7 EXHIBIT A - DOCUMENTS REQUESTED

8
9 **REQUEST FOR PRODUCTION NO. 1:** Produce all documents containing, referencing or
 10 otherwise relating to Defendant's efforts (including training materials), to ascertain and/or comply
 11 with the requirements of ORS 652.140 in the two (2) year time period prior to the filing of the
 12 Complaint in this matter, through the date of filing, for those Oregon hourly employees who left
 13 AutoZone employment during that period.

14
15 **RESPONSE:** See, generally, Exhibit 8 to Deposition of Mark Dessem (publication is
 16 periodically updated), Response to RFP 7, AZ/Migis 0002215. Further, each store posts required
 17 BOLI notices regarding Oregon wage and hour requirements.

18
19
20 **REQUEST FOR PRODUCTION NO. 2:** Produce all documents in effect within the two (2) year
 21 time period prior to the filing of the Complaint in this matter, through the date of that filing,
 22 containing, referencing, or otherwise relating to Defendant's policies, procedures, and/or practices
 23 for the termination, voluntary or involuntary, of Oregon AutoZone hourly employees.

24
25 **RESPONSE:** See, generally, Response to RFP 7, and Defendant's response to Plaintiffs'

26 **EXHIBIT A**

Page 4 of 9

1 earlier Requests for Production, notable AZ/Migis 0001621-1655.

2
3
4 **REQUEST FOR PRODUCTION NO. 3:** Produce any and all Daily Coverage Lists for (or used in
5 or by) all Oregon AutoZone stores, for the period of time from two (2) years prior to the filing of the
6 Complaint, through the date of that filing.

7
8 **RESPONSE:** These documents are not retained for the period requested.

9
10
11 **REQUEST FOR PRODUCTION NO. 4:** Produce all documents and reports reflecting any weekly
12 summarization of hours worked by AutoZone hourly employees in stores located in the State of
13 Oregon, for the period of time from two (2) years prior to the filing of the Complaint, through the
14 date of that filing.

15
16 **RESPONSE:** See, attached disk, identified as AZ/Migis 0002214.

17
18
19 **REQUEST FOR PRODUCTION NO. 5:** Produce in electronic format all time sheets reflecting
20 the hours each Oregon hourly employee worked for Defendant, including but not limited to, all time
21 records, time cards, punch clock records, time sheets, work time schedules, for the period of time
22 from one (1) year prior to the filing of the Complaint, through the date of that filing.

23
24 **RESPONSE:** Objection. This Request is vague, overbroad and irrelevant, and exceed the
25 proper scope of pre-certification discovery. Defendant will produce the records should a class be

26
EXHIBIT A
Page 5 of 9

1 certified.

2
3 **REQUEST FOR PRODUCTION NO. 6:** Produce all documents that are, or that reference
4 Defendant's policies, procedures, and/or practices containing, referencing, or otherwise relating to
5 the review, correction, modification, alteration, and/or approval (by any AutoZone employee) of
6 time cards and hours worked by AutoZone hourly employees in Oregon, in effect for the time period
7 three (3) years prior to the filing of the Complaint in this matter, through the date of that filing.

8
9 **RESPONSE:** *See, generally, documents identified in Response to RFP No. 7.*

10
11
12 **REQUEST FOR PRODUCTION NO. 7:** Produce all documents, reflecting, containing, or
13 otherwise relating to any and all discussions (including communications in any form) between, or
14 any training given or taken by, any AutoZone employees, regarding the hours worked (including but
15 not limited to start and end times, rest breaks, meal periods, and overtime) by AutoZone hourly
16 Oregon employees, during the period of time from two (2) years prior to the filing of the Complaint,
17 through the date of that filing.

18
19 **RESPONSE:** *See, AZ/Migis 0001882-00002213.*

20
21
22 **REQUEST FOR PRODUCTION NO. 8:** Produce all documents that are, or that reflect, contain or
23 otherwise relate to any and all policies, procedures, and/or practices implemented, modified or
24 changed, and/or any other actions taken, directed, approved, reviewed or otherwise implemented by
25
26

EXHIBIT A
Page 6 of 9

1 any AutoZone manager or officer regarding the hours worked (including but not limited to start and
2 end times (recorded or unrecorded), rest breaks, meal periods, and overtime) by AutoZone hourly
3 Oregon employees, during the period of time from two (2) years prior to the filing of the Complaint,
4 through the date of that filing.

5 **RESPONSE:** See, generally, documents attached to preceding Requests for Production.
6
7
8

9 **REQUEST FOR PRODUCTION NO. 9:** Produce all documents, reflecting, containing, or
10 otherwise relating to Defendant's efforts to preserve all potentially discoverable information relating
11 to the subject matter of this lawsuit.

12 **RESPONSE:** Objection. This Request is vague, overbroad and irrelevant. Defendant is
13 unable to ascertain which information Plaintiff might perceive as "potentially discoverable." This
14 Request requires the disclosure of privileged and confidential attorney client communications.
15 Without waiving such objection, see answers to preceding Requests.
16
17
18

19 **REQUEST FOR PRODUCTION NO. 10:** Produce all documents supporting, refuting or relating
20 to Defendant's Fourth Affirmative Defense (Laches).
21

22 **RESPONSE:** Objection. This Request calls for the disclosure of privileged attorney work
23 product. Without waiving such objection, the documents that support this defense are pay and time
24 records from Plaintiff Migis that show he was paid in accordance with hours reported, which have
25 already been produced to Plaintiff, and an absence of documents from Plaintiff Migis to indicate he
26

EXHIBIT A
Page 7 of 9

1 had any issues, complaints or shortages throughout his entire period of employment.

2
3
4 **REQUEST FOR PRODUCTION NO. 11:** Produce all documents supporting, refuting or relating
5 to Defendant's Sixth Affirmative Defense (Failure to Comply with ORCP 32).
6

7 **RESPONSE:** Objection. This Request calls for the disclosure of privileged attorney work
8 product.
9

10
11 **REQUEST FOR PRODUCTION NO. 12:** Produce all documents supporting, refuting or relating
12 to Defendant's Eighth Affirmative Defense (Pending Claims).
13

14
15 **RESPONSE:** Objection. This Request calls for the disclosure of privileged attorney work
16 product. Without waiving such objection, see, pleadings and responses filed by AutoZone in
17 response to the complaint of *Joarnt et al. v. AutoZone*.
18

19
20 **REQUEST FOR PRODUCTION NO. 13:** Produce all documents supporting Defendant's
21 contention in its Eighth Affirmative Defense that "Plaintiff and many of the putative class members
22 in this action are also putative class members in *Joarnt et al. v. AutoZone, Inc.*"
23

24 **RESPONSE:** Objection. This Request calls for the disclosure of privileged attorney work
25 product. Without waiving such objection, see, pleadings and responses filed by AutoZone in
26

EXHIBIT A
Page 2 of 9

1 response to the complaint of *Joarnt et al. v. AutoZone*. See, also, pleadings filed by Plaintiff which
2 acknowledge that "some people may be members of both classes," identified, for this purpose, as
3 AZ/Migis 0002216-2218.
4

5
6
7 Dated: May 5, 2008

8
9 
10 Leigh Ann Collings Tift OSB No. 05473
11 LITTLER MENDELSON
12 A Professional Corporation

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Attorneys for Defendant
Autozone Inc.

EXHIBIT A
Page 9 of 9

Store	Fiscal Year	Fiscal Period	Fiscal Week	Worked Hours
1689	2006	3	2	161
2203	2006	3	2	178
2213	2006	3	2	120
2214	2006	3	2	186
2216	2006	3	2	194
2217	2006	3	2	176
2219	2006	3	2	219
2222	2006	3	2	279
2223	2006	3	2	157
2225	2006	3	2	380
2226	2006	3	2	254
2227	2006	3	2	324
2228	2006	3	2	246
2229	2006	3	2	229
2231	2006	3	2	188
2232	2006	3	2	143
2233	2006	3	2	225
2235	2006	3	2	71
2236	2006	3	2	207
2237	2006	3	2	152
2238	2006	3	2	142
2245	2006	3	2	208
2246	2006	3	2	160
3751	2006	3	2	166
1689	2006	3	3	165
2203	2006	3	3	173
2213	2006	3	3	131
2214	2006	3	3	176
2216	2006	3	3	204
2217	2006	3	3	162
2219	2006	3	3	226
2222	2006	3	3	266
2223	2006	3	3	154
2225	2006	3	3	391
2226	2006	3	3	319
2227	2006	3	3	323
2228	2006	3	3	241
2229	2006	3	3	229
2231	2006	3	3	220
2232	2006	3	3	172
2233	2006	3	3	235
2235	2006	3	3	160
2236	2006	3	3	190
2237	2006	3	3	164
2238	2006	3	3	141
2245	2006	3	3	207
2246	2006	3	3	187
3751	2006	3	3	164
1689	2006	3	4	171
2203	2006	3	4	148

EXHIBIT B
Page 1 of 1

Per 12 wk
 Payroll Weekly Hours Summary Report *** AutoZone 2229 *** 07/12/2003
 21:09:04
 Page 1

AUTOZONER	REG HRS	VAC HRS	INV HRS	SCK HRS	PRG NEW	TRN HRS	COM HRS	OTH HRS	HRS PD	TOT OT
ASTORIAS,	12:01	-	-	-	-	-	-	-	12:01	-
CARRERA,	8:12	-	-	-	-	-	-	-	8:12	-
COSTACHE,	42:02	-	-	-	-	-	-	-	42:02	-
FLORES, J	28:50	-	-	-	-	-	-	-	28:50	-
GENERIC M	-	-	-	-	-	-	-	-	-	-
LAVIOLETT	29:19	-	-	-	-	-	-	-	29:19	-
NARAYAN,	39:35	-	-	-	-	-	-	-	39:35	-
NAVA GOME	20:40	-	-	-	-	-	-	-	20:40	-
SALDORS,	7:00	-	-	-	-	-	-	-	7:00	-
SOHL, DAV	50:00	-	-	-	-	-	-	-	50:00	-
Total	237:39	-	-	-	-	-	-	13:27	251:06	8:44

AUTOZONER	MAINT TECH	TRUCK DR	CONTR SEC	OTHER HRS
99-9999	-	0:23	-	-

S - Salaried AutoZoner.

AZPB001520

EXHIBIT C
 Page 1 of 1

LITTLER MENDELSON[®]
A PROFESSIONAL CORPORATION

June 3, 2008

Amy R. Alpern
Direct: 503.889.8878
Direct Fax: 503.914.1816
aalpern@littler.com

VIA MAIL AND FACSIMILE 360-567-3331 AND U.S. MAIL

Chey Powelson
Bailey Pinney & Associates, LLC
1498 SE Tech Center Place, Suite 290
Vancouver, WA 98683

Re: Migis v. AutoZone, Inc.
Multnomah County Circuit Court Case No. 0711-13531

Dear Chey:

This follows up on my May 23, 2008 letter to you in which I outlined what we were willing to do to resolve the outstanding discovery issues. In that letter I told you that I would get back to you by June 3, and I am now doing so. For reasons that cause me great concern, you continued to file motions to compel, and to ask for yet additional documents, while we are diligently working to produce those items outlined in my May 23 letter. Indeed, I do believe at this point that you are intentionally making things more difficult than they need to be. For example, I prepared a protective order and asked that you sign it. (I told you that the form of protective order I prepared had been approved by the Multnomah County Presiding Court.) Rather than signing my order, you sent me a different order and required that we submit that order, instead. I did not want to fight about the issue, so I agreed to sign your proposed order and then brought it to the scheduling conference to ask the Court to sign it per our discussion on May 23. When I asked you to sign the order at that scheduling conference, you said you could not do so because you prepared it for Mr. Bailey's signature. I then asked Mr. Bailey, who was also at the scheduling conference, to sign it. He said he could not do so because he had not read it. When I pointed out to him that it was on your firm's letterhead, and urged him to sign it, he finally agreed to do so. However, when I presented it to Judge Maurer at the scheduling conference, she had concerns about the language in the order and asked her assistant to review it. As it now stands, we do not have a signed protective order.

I have now enclosed another protective order that complies with the Multnomah County rules. I signed it, ask that you do so, and ask that you forward it to the Presiding Court.

Moving on to my May 23, 2008 letter, I respond as follows:

1. We agreed to allow you to depose Mark Dessem as a corporate representative pursuant to ORCP 39(c)(6) even though you have already taken one 39(c)(6)

EXHIBIT C-1
Page 1 of 3

Chey Powelson
June 3, 2008
Page 2

deposition. We believe that Mr. Dessem is likely to be able to address some of the issues set forth in the 39(c)(6) notice that took place on May 15, 2008.

I also told you at the May 15 deposition that we would provide you with additional information regarding the total number of full- and part-time hourly AutoZone employees for the time periods set forth in your notice. We reviewed the W-2s for 2006 and can advise you that AutoZone employed 423 employee in Oregon that year. As you recall, we have already provided you with this information for the year 2007. I am still working on 2004 and 2005 and will respond to that request, although I am told that the information is on the payroll tax reports that were produced to your firm in the Joarnt matter. Nonetheless, I will review those reports as well, and get our answer to you promptly.

2. As I suspected, the reference to "attendance calendars" in Mr. Jon's deposition is, in fact, a reference to the variance reports. Since we have already produced the variance reports, we have already satisfied this request.

With respect to Request for Production No. 5 (weekly schedule reports referencing Mr. Migis' work schedule, both approved and unapproved, for three years prior to the filing of the complaint), we have now double-checked the period boxes for the two stores in which Mr. Migis worked in Oregon and can confirm that no additional records responsive to this request exist.

We also agreed to send you a screen print of Mr. Migis' paycheck data. It is enclosed.

3. See my May 23 letter.
4. With respect to the May 9 letter you sent to us regarding the authenticity of documents, I can advise you that defendant will stipulate that each of the listed documents, with one exception, is authentic, i.e., that they are what they purport to be. The exception is AG-Migis 0002214. We do not have a copy of that and I suspect that we may have made a numbering mistake.
5. We promised you that we would produce, in electronic Microsoft Excel format, the lunch variation reports that have been previously produced to you in hard copy. I understand that Leigh Ann Tift FedExed those to you yesterday and that you are in possession of those.
6. Defendant has reconsidered its objection to your request for one year's worth of time records for hourly employees in the State of Oregon, but have two caveats. Defendant will seek to shift the cost of producing these records to plaintiff if we are

EXHIBIT C-1
Page 2 of 3

Chey Powelson
June 3, 2008
Page 3

able to establish that they are not relevant, and/or if the class is not certified. Second, we are agreeing to produce the documents pursuant to the terms of a mutually agreeable protective order. With that understanding, defendant will produce electronic records of time worked for each AutoZone employee from November 2006 to November 2007. Please let me know when you have signed the order and have forwarded it to the Court, and we will produce the documents.

7. See my May 23 letter.
8. Defendant has located and is willing to produce reports reflecting weekly summarizations of hours worked by AutoZone employees as requested in Plaintiff's Third Request for Production No. 4. Defendant is willing to produce this information pursuant to the terms of a protective order. Please let me know when you have signed that order and forwarded it to the Court, and we will provide you with the requested documents.
9. As promised, defendant's store managers are making a second attempt at finding termination reports. We have looked at the personnel files of all employees to assure that no termination reports were missed, and the AutoZone's Store Managers have been asked to complete their review by June 5. I will let you know what, if anything, they are able to locate. Given Ms. Tift's experience in reviewing the period boxes for the last two stores in which Mr. Migis worked, I strongly doubt that we will find additional responsive documents. Nonetheless, we have taken the time consuming step of looking a second time.

Please understand that your discovery requests have been extremely cumbersome, that we have spent the last month telling you that we want to work cooperatively on discovery issues. As you can see, we have offered several concessions. Despite that, you continue to file motions to compel and motions for sanctions. At some point, I do hope that we are able to move this case in a direction that is likely to benefit our respective clients. That is what you want, right?

Very truly yours,

LITTLER MENDELSON

Amy R. Alpern
Amy R. Alpern

ARA/jrs
Enclosures

EXHIBIT C-1
Page 3 of 3

Chey Powelson

From: Chey Powelson
Sent: Wednesday, June 04, 2008 12:50 PM
To: 'Alpern, Amy R.'
Cc: Tift, Leigh Ann C.; Bud Bailey; Brad Griffin; Charity Shindle
Subject: RE: Protective Order
Attachments: To Defendant_Signed SPO_06-04-2008.pdf; AutoZone St Ore Migis.Stipulated Protective Order (signed by Judge Maurer).6-4-08 fax.lg.pdf

Ms. Alpern:

See attached, also to arrive via fax.

From: Alpern, Amy R. [mailto:AAIpern@littler.com]
Sent: Wednesday, June 04, 2008 9:57 AM
To: Chey Powelson
Cc: Tift, Leigh Ann C.
Subject: RE: Protective Order

Interesting, Chey. Without knowing what information is in the documents, you assume that we are holding them "hostage" rather than assuming that we have a legitimate basis for requesting a protective order. The fact is, the weekly summarizations of hours worked report contains social security numbers and other confidential information. If you do not sign and forward the protective order based on my representation that we have documents that are appropriately covered by such order, feel free. The delay, at this point, is due to your refusal to sign the protective order. Not much I can do at this point.

Amy R. Alpern|Littler Mendelson, PC
The National Employment & Labor Law Firm®

Telephone: 503.221.0309 | Fax: 503.242.2457
Cell: 503.539.9811

From: Chey Powelson [mailto:cpowelson@wagelawyer.com]
Sent: Wednesday, June 04, 2008 9:45 AM
To: Alpern, Amy R.
Cc: Tift, Leigh Ann C.; Bud Bailey; Brad Griffin; Charity Shindle
Subject: RE: Protective Order

In other words, the time records are being held hostage?

From: Alpern, Amy R. [mailto:AAIpern@littler.com]
Sent: Wednesday, June 04, 2008 9:43 AM
To: Chey Powelson
Cc: Tift, Leigh Ann C.; Bud Bailey; Brad Griffin; Charity Shindle
Subject: RE: Protective Order

What I told you when we were at the case management conference was that the form of order I had submitted to you, and that you refused to sign, was signed by Judge Maurer in another case I had in Multnomah and that as a consequence, I knew the language was acceptable. What I suggest you do is sign and submit the protective order as is. If you object to

EXHIBIT D
Page 1 of 1

6/25/2008

BAILEY, PINNEY & ASSOCIATES, LLC

Attorneys at Law
1498 SE TECH CENTER PLACE, SUITE 290
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CHEY POWELSON

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* Washington License W88A 34593
* Oregon License OSB 03551

June 4, 2008

VIA E-MAIL & FAX: 503 - 914 - 1816

Ms. Amy Alpern
Aalpern@littler.com
1750 SW Harbor Wy, Ste 450
Portland, OR 97201

Re: Migis v. AutoZone, Inc. (Multnomah Co. Case No. 0711-13531)
Discovery Issues / Your Letter of June 3

Ms. Alpern:

Stipulated Protective Order

In early May 2008, Defendant agreed to sign Plaintiff's proposed Stipulated Protective Order. On May 15 I personally provided you a copy of that Order, which you then presented to Judge Maurer during the case management conference on May 27, although immediately after such presentment you informed Judge Maurer that Plaintiff refused to sign your proposed order.

Yesterday evening you then sent another proposed, stipulated protective order and, in conjunction with various e-mails this morning, insisted that: (a) I immediately sign it, (b) my conduct of not immediately signing it was causing "unnecessary delay," and (c) there was not much else you could do at this point.

Plaintiff will not sign your newest proposed Order sent yesterday evening because Presiding Court signed Plaintiff's Stipulated Protective Order, with modifications, that you presented during the management conference on May 27. For your convenience, enclosed is a copy of that signed Order.

Employee Time Records

Based on the existence of that signed Order, please immediately produce the employee time records as requested in Plaintiff's Third Set Request For Production No. 5 (see also my April 1 letter to Defendant).

Based on the content of Defendant's communications this morning to Plaintiff, it is apparent that both sides agree AutoZone's immediate production of the employee time records will help the parties avoid any further, unnecessary delay. Cost-shifting is not appropriate at this time. After producing

EXHIBIT E
Page 1 of 3

Ms. Amy Alpern – Migis v. AutoZone, Inc. (Discovery Issues / June 3 Letter)

4 June 2008

2

the information and if Defendant still seeks reimbursement, Defendant can address this matter with the Court.

Other Discovery Issues as Addressed in the May 21 Discovery Conference

Your June 3 letter appears to respond to your May 23 letter. I will address certain issues based on the record and my recollection of the issues. (Any omission from the following does not constitute a waiver of Plaintiff's right to address them at a later date.)

1. ORCP 39C(6) Issues: Plaintiff looks forward to Defendant's production of the information as requested from AutoZone in the May 15 deposition.
2. Attendance Calendars (Plaintiff's Second Set RFP No. 4; Court Order): During the May 21 conference you expressly committed to providing Plaintiff with a redacted copy of an actual Attendance Calendar. You confirmed this commitment in your May 23 letter.

But your June 3 letter failed to include any calendar. Please produce a redacted copy by the end of the day this Friday, June 6.

3. Plaintiff's Proposed Stipulation of the Excel Summary Report: You advised in your May 23 letter that the document "is not even a business record under ORE 803." However, I refer you to the April 8, 2008 hearing on this matter, during which Defendant seemed to suggest that the report was, as its name suggests, a summary of other documents. As you may know, Evidence Code 1006 addresses such evidence.

Ms. Tift's comments on the record during the April 22 hearing bolsters this conclusion.

4. Excel Format Variance & Exception Reports (Plaintiff's Second Set RFP No. 4; Court Order): Unless I am mistaken, Defendant has still not produced in Excel format the exceptions report(s). See Bates Nos. AZ/MIGIS 0001220-35. Please do so by the end of the day this Friday, June 6.
5. Weekly Summarizations of Hours Worked (Plaintiff's Third Set RFP No. 4): As an initial matter, the one Excel file Defendant produced in response to this Request was Bates No. AZ/MIGIS 0002214, which you identify in your June 3 letter as a document that Defendant will not stipulate to as authentic.

Moreover, now that Plaintiff's Stipulated Protective Order is signed, Defendant should produce the additional reports so as to avoid unnecessary delay.

This is also to confirm that after 3:00 p.m. today I will call Ms. Tift to confer on the perceived position Defendant has taken regarding the Excel Summary Report and its responsiveness to Plaintiff's First Set Request For Production No. 24 ("** *all documents and electronically stored

Ms. Amy Alpern - Migis v. AutoZone, Inc. (Discovery Issues / June 3 Letter)

4 June 2008

3

information, which evidence the date on which any employee's employment terminated, in the year proceeding [sic] this lawsuit.").

Finally, it is disappointing that Defendant has recently resorted to making personal attacks on Plaintiff's counsel, while at the same time urging the need to work in a collaborative fashion.

This undoubtedly sends mixed messages, and clouds the real issues that must be addressed and resolved if the Court is to make reasoned determinations on a fully-developed record.

I would also like to remind you that, in the context of the last paragraph in your June 3 letter, you inadvertently put the cart before the horse. Therefore, to clarify:

1. After several discovery conferences, Defendant remained steadfast in its refusal to produce certain information.
2. Then Plaintiff filed motions to compel that information.
3. Only then did Defendant in its June 3 letter offer to make concessions (with certain strings attached), but at the same time accused Plaintiff of continuing to file motions.

Be advised Plaintiff has not filed any motions since June 3.

I hope that in the future we may agree on additional matters without Court intervention. Thank you for your time.

Sincerely,

/s/

Chey K. Powelson
Attorney for Plaintiff

Enclosure

cc: Ms. Leigh Ann Tift (via e-mail only, with encl. as attachment)

EXHIBIT E
Page 3 of 3

Chey Powelson

From: Chey Powelson
Sent: Thursday, June 19, 2008 9:35 AM
To: 'Alpern, Amy R.'; Tift, Leigh Ann C.
Cc: Bud Bailey; Sharon D. Cousineau; Megan Treseder
Subject: FW: Protective Order
Importance: High

Counsel:

Please advise as to the below-referenced item Nos. (2) and (3). As for (3), see also my June 4 e-mail to Ms. Tift, and June 4 letter to Ms. Alpern.

Please also advise, as I alluded to on Tuesday and on June 9, the whereabouts of the weekly reports (summarizations), which Defendant on June 4 promised via e-mail to produce, and which are responsive to Plaintiff's Third Set RFP No. 4. Defendant has not responded to Plaintiff's multiple inquiries.

Thanks.

Chey

From: Chey Powelson
Sent: Monday, June 09, 2008 10:41 AM
To: 'Tift, Leigh Ann C.'; 'Alpern, Amy R.'
Cc: Charity Shindle; Brad Griffin; Sharon D. Cousineau; Bud Bailey
Subject: RE: Protective Order

Counsel:

Please advise as to when the following events will occur:

- (1) Defendant's responses, due the week before last, to Plaintiff's Fourth Set of Requests For Production. I did not receive word or an update last Thursday, nor did I receive the responses Friday, despite Defendant's assurances.
- (2) Defendant's production of an attendance calendar, as promised on May 21.
- (3) Defendant's production of the exceptions report in MS Excel format, as promised in early May.
- (4) Defendant's remedying of its filing of my client's SSN into the public record, to the extent Defendant was unable to prevent such filing Friday afternoon after faxing those documents to Plaintiff.

Thank you for your attention to these matters.

Chey Powelson

From: Tift, Leigh Ann C. [mailto:LTift@littler.com]
Sent: Friday, June 06, 2008 11:55 AM
To: Chey Powelson
Subject: RE: Protective Order

EXHIBIT F
Page 1 of 1

6/25/2008

Chey Powelson

From: Alpern, Amy R. [AAlpern@littler.com]
Sent: Wednesday, June 25, 2008 10:45 AM
To: Chey Powelson
Cc: Tift, Leigh Ann C.; Sharon D. Cousineau; Bud Bailey; Megan Treseder; Dana Pinney; Stewart, Joanna R.
Subject: RE: Protective Order

Hi Chey.

It looks to me like we are still conferring. I sent you the email below on Tuesday, you responded later that same day, and Leigh Ann and I were on the phone talking about your response this morning when you emailed asking for dates so that you could file yet another motion to compel. It is all too clear that you do not read emails, do not want to work through these issues, and that you do not appreciate the fact that the court would prefer that we work these matters out on our own. We will get back to you on this once we have looked into the questions you raise. In the meantime, put your motion to compel back in your pocket.

Amy R. Alpern|Littler Mendelson, PC
The National Employment & Labor Law Firm®

Telephone: 503.221.0309 | Fax: 503.242.2457
Cell: 503.539.9811

From: Chey Powelson [mailto:cpowelson@wagelawyer.com]
Sent: Wednesday, June 25, 2008 10:32 AM
To: Alpern, Amy R.
Cc: Tift, Leigh Ann C.; Sharon D. Cousineau; Bud Bailey; Megan Treseder; Dana Pinney; Stewart, Joanna R.
Subject: RE: Protective Order
Importance: High

Please confirm or deny, as requested below, that Defendant is available on July 31 or August 1.

From: Alpern, Amy R. [mailto:AAlpern@littler.com]
Sent: Tuesday, June 24, 2008 4:56 PM
To: Chey Powelson
Cc: Tift, Leigh Ann C.; Sharon D. Cousineau; Bud Bailey; Megan Treseder; Dana Pinney; Stewart, Joanna R.
Subject: RE: Protective Order

Dear all,

It appears that we are now down to two discovery matters. The first relates to "exceptions reports," which as I understand based on you June 19 email were produced but not in the excel format you would like, and the weekly hours summary report. (Recall, as well, that we have already produced the weekly hours summary report - see disk AZ Migis 2214. After receiving that report you said you wanted the information broken down by employee even though it is not set forth in your document request that way.)

Frankly, neither Leigh Ann nor I have any idea what you are referring to by "exceptions reports." You have identified these reports as having been produced to plaintiff at AZ 0001220 -35. I have those documents and they are what I have referred to as the variance reports. We have already produced the variance reports, and then reproduced them in excel format, so I don't think there is anything else to be produced here. Keep in mind that the reports you referenced are not referred to as "exceptions reports" on the documents or anywhere else that I am aware of. Keep in mind, as well, that the variance reports, and the time records that we produced for ALL employees, show exactly when employees clocked in

EXHIBIT G

Page 10 of 5

6/26/2008

and clocked out, so you have the information that I believe you are after in at least two different formats.

The information in the weekly hours summary report you seek, i.e., the summary of hours by employee, is, like the variance reports, in the time records that we produced. Frankly, we produced one full year's worth of the time records, even though we do not think they are relevant, because we believed you would recognize that we were not only willing to compromise our position, but that we were willing to give you virtually all of the information that we believe you have been asking for. Unfortunately, you appear to have ignored the information in the documents produced, preferring instead to pursue motions to compel. I have yet to figure out why you need the information in multiple formats, and why you expect defendant to format the information in exactly the manner that is most convenient to you, but that is not what is required. And, although we have on several occasions given you the information in the preferred format hoping that you would be satisfied, that is never the case. So, unless you can better identify the "exceptions reports", and unless you can identify what INFORMATION you don't have, I believe we have produced the requested documents and, in some cases, produced it multiple times.

Best regards,

Amy R. Alpern|Littler Mendelson, PC
The National Employment & Labor Law Firm®

Telephone: 503.221.0309 | Fax: 503.242.2457
Cell: 503.539.9811

From: Chey Powelson [mailto:cpowelson@wagelawyer.com]
Sent: Monday, June 23, 2008 4:43 PM
To: Alpern, Amy R.
Cc: Tift, Leigh Ann C.; Sharon D. Cousineau; Bud Bailey; Megan Treseder; Dana Pinney
Subject: RE: Protective Order

Compelling on the promised weekly summarization of hours reports, and the exceptions/variance reports in Excel format. We've been conferring on these matters since early May (I don't want to spend any more time, and I'm sure you don't either), and we are done conferring unless Defendant actually produces them. Last I heard regarding the summarization of hours issue was on June 4, at which time Defendant said it would produce them once it had a signed stipulated protective order.

From: Alpern, Amy R. [mailto:AAAlpern@littler.com]
Sent: Monday, June 23, 2008 4:27 PM
To: Chey Powelson
Cc: Tift, Leigh Ann C.
Subject: RE: Protective Order

Hi,

I just called Leigh Ann to follow up on the matter set forth in the second paragraph of your June 19th email of 1:55 pm. I will get back to you later today or tomorrow after I have spoken to her about that. As to the "attendance reports," there are none. Please let me know what items you are seeking to compel with respect to the July 31 or August 1 dates so I may determine if we have conferred.

Amy R. Alpern|Littler Mendelson, PC
The National Employment & Labor Law Firm®

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EXHIBIT G
Page 2 of 5

6/26/2008

From: Chey Powelson [mailto:cpowelson@wagelawyer.com]
Sent: Monday, June 23, 2008 9:18 AM
To: Alpern, Amy R.; Tift, Leigh Ann C.
Cc: Bud Bailey; Sharon D. Cousineau; Megan Treseder; Lucero, Laura M.
Subject: RE: Protective Order

Counsel:

Please advise as to Defendant's availability for hearing on a motion to compel either July 31 or August 1 at 9:00 a.m. Thanks.

From: Alpern, Amy R. [mailto:AAlpern@littler.com]
Sent: Thursday, June 19, 2008 2:08 PM
To: Chey Powelson; Tift, Leigh Ann C.
Cc: Bud Bailey; Sharon D. Cousineau; Megan Treseder; Lucero, Laura M.
Subject: RE: Protective Order

Chey,

Paragraph one below is classic. If a witness describes a document as an attendance calendar and later states that his reference was in fact to a Variance report, what that means is that there is no such thing as an "attendance calendar" and that the witness simply misspoke. I explained this to you on June 3, and your claim that I am "reneging" is preposterous. You will not get anywhere with me, Chey, if you continue to mischaracterize events and assume evil where no evil lies.

In Multnomah County, making a claim that an attorney has "reneged" is serious. In the future, please do not accuse me of reneging unless you mean it. I know, and you know, that you do not mean it.

I will respond to your other questions in a bit. I have a summary judgment filing that is pressing.

I am placing this email, and others like it, in my examples of "Chey running up fees needlessly" file.

Amy R. Alpern|Littler Mendelson, PC
The National Employment & Labor Law Firm®

Telephone: 503.221.0309 | Fax: 503.242.2457
Cell: 503.539.9811

From: Chey Powelson [mailto:cpowelson@wagelawyer.com]
Sent: Thursday, June 19, 2008 1:55 PM
To: Alpern, Amy R.; Tift, Leigh Ann C.
Cc: Bud Bailey; Sharon D. Cousineau; Megan Treseder
Subject: RE: Protective Order

I am familiar with your letters and e-mails. Your follow up letter to the May 21 in-person conference confirmed your commitment to send me an attendance calendar. This goes back to, once again, Defendant doing what it commits to. Defendant then tried to back out of that deal with your June 3 letter. I'm going with our earlier agreement, not a later, unilateral decision to renege on an agreement.

EXHIBIT G
Page 3 of 5

6/26/2008

This also goes for the Lunch Variance reports and Exceptions Reports. Again, while you are correct you have produced the Variance report in Excel format (upon my request and Defendant's commitment to do so, then attempted renegeing of that commitment), Defendant has not produced the Exceptions Report in Excel format. The Court ordered the production of these reports back in March.

Finally, while I realize you are busy, so am I, and its tiring to follow up with the same questions. You have still not answered my question regarding the production of the weekly hours summary report that you expressly committed to producing. Please do so.

Chey

From: Alpern, Amy R. [mailto:AAIpern@littler.com]
Sent: Thursday, June 19, 2008 12:49 PM
To: Chey Powelson; Tift, Leigh Ann C.
Cc: Bud Bailey; Sharon D. Cousineau; Megan Treseder
Subject: RE: Protective Order

Chey,

Please see my June 3, 2008 letter to you regarding (2) and (3). And yes, I reviewed your June 4 letter to me and June 4 email to Ms. Tift. I have concluded, however, that you must not have read my June 3 letter to you stating that Mr. Jon's reference to "attendance calendars" is in fact a reference to the variance reports which have already been produced.

In addition, per my June 3 letter, we have already produced the lunch variance reports in hard copy, and when you requested them in an excel spreadsheet, we complied with that request by FedExing them to you on June 2.

I realize that you are very busy, but please review our letters and document production before letting emails fly. It is quick and easy to send emails, but it is really a bit frustrating for me to have to remind you that we have already produced documents and answered your questions. Before sending me another email about document production, please read what we have sent to you and ask yourself if you in fact have the information requested. I, too, am busy.

Best regards,

Amy R. Alpern|Littler Mendelson, PC
The National Employment & Labor Law Firm®

Telephone: 503.221.0309 | Fax: 503.242.2457
Cell: 503.539.9811

From: Chey Powelson [mailto:cpowelson@wagelawyer.com]
Sent: Thursday, June 19, 2008 9:35 AM
To: Alpern, Amy R.; Tift, Leigh Ann C.
Cc: Bud Bailey; Sharon D. Cousineau; Megan Treseder
Subject: FW: Protective Order
Importance: High

Counsel:

Please advise as to the below-referenced item Nos. (2) and (3). As for (3), see also my June 4 e-mail to Ms. Tift, and June 4 letter to Ms. Alpern.

EXHIBIT 5
Page 4 of 5

6/26/2008

Please also advise, as I alluded to on Tuesday and on June 9, the whereabouts of the weekly reports (summarizations), which Defendant on June 4 promised via e-mail to produce, and which are responsive to Plaintiff's Third Set RFP No. 4. Defendant has not responded to Plaintiff's multiple inquiries.

Thanks.

Chey

From: Chey Powelson
Sent: Monday, June 09, 2008 10:41 AM
To: 'Tift, Leigh Ann C.'; 'Alpern, Amy R.'
Cc: Charity Shindle; Brad Griffin; Sharon D. Cousineau; Bud Bailey
Subject: RE: Protective Order

Counsel:

Please advise as to when the following events will occur:

- (1) Defendant's responses, due the week before last, to Plaintiff's Fourth Set of Requests For Production. I did not receive word or an update last Thursday, nor did I receive the responses Friday, despite Defendant's assurances.
- (2) Defendant's production of an attendance calendar, as promised on May 21.
- (3) Defendant's production of the exceptions report in MS Excel format, as promised in early May.
- (4) Defendant's remedying of its filing of my client's SSN into the public record, to the extent Defendant was unable to prevent such filing Friday afternoon after faxing those documents to Plaintiff.

Thank you for your attention to these matters.

Chey Powelson

From: Tift, Leigh Ann C. [mailto:LTift@littler.com]
Sent: Friday, June 06, 2008 11:55 AM
To: Chey Powelson
Subject: RE: Protective Order

You said you would wait to hear from me until the end of the week. I told you this morning you will get the answers to the 4th RFPs. I did not ever say the rules don't apply or anything like that, and you are just inventing an outrageous position for reasons I can't begin to fathom.

From: Chey Powelson [mailto:cpowelson@wagelawyer.com]
Sent: Friday, June 06, 2008 10:53 AM
To: Tift, Leigh Ann C.
Subject: RE: Protective Order

No, I was just looking at ORCP 43.

Nonetheless, just as Defendant has done during the entire course of this lawsuit, it appears once again AutoZone contends that the Rules don't apply to it.

EXHIBIT 6
Page 5 of 5

6/26/2008

Michael Migis

May 20, 2008

Page 1

1 IN THE CIRCUIT COURT OF THE STATE OF OREGON.

2 FOR THE COUNTY OF MULTNOMAH

3
4 MICHAEL MIGIS, individually,

5 and on behalf of all other

6 persons similarly situated,

7 Plaintiff,

8 vs.

NO. 0711-13531

9 AUTOZONE, INC., a Nevada Corporation,

10 Defendant.

11
12
13 VIDEOTAPED

14 DEPOSITION OF MICHAEL MIGIS

15
16
17 Taken on Behalf of the Defendant

18 Tuesday, May 20, 2008

19
20
21
22
23
24
25
Beovich Walter & Friend

EXHIBIT H
Page 1 of 6

Michael Migis

May 20, 2008

Page 2

1 BE IT REMEMBERED THAT, the deposition of
2 MICHAEL MIGIS was taken before Charlotte A. Powers,
3 Certified Shorthand Reporter and Registered Merit
4 Reporter, on Tuesday, May 20, 2008, commencing at
5 the hour of 9:08 a.m., the proceedings being
6 reported in the offices of BAILEY PINNEY &
7 ASSOCIATES, LLC, 1498 SE TECH CENTER PLACE, K SUITE
8 290, Vancouver, Washington.

10 APPEARANCES

11 BAILEY PINNEY & ASSOCIATES, LLC

12 By Mr. A. E. Bud Bailey and

13 Mr. Chey Powelson

14 1498 SE Tech Center Place, Suite 290

15 Vancouver, Washington 98683

16 Appearing on behalf of Plaintiff

18 LITTLER MENDELSON, P.C.

19 By Ms. Leigh Ann Tift

20 701 5th Avenue, Suite 6500

21 Seattle, Washington 98104

22 Appearing on behalf of Defendant

24 ALSO PRESENT: John Jay, Videographer

25 * * * * *

EXHIBIT #

Beovich Walter & Friend

Page 2 of 6

Michael Migis

May 20, 2008

Page 74

Page 76

1 Q Okay.
 2 A I -- I don't recall saying there wasn't a
 3 schedule for lunches.
 4 Q Okay. Continuing on down the page, it
 5 says "overtime."
 6 A Okay.
 7 Q Do you see that?
 8 A Uh-huh.
 9 Q And it says: Because we're a successful
 10 company, your supervisor may require you to
 11 stay beyond your scheduled work time to finish
 12 an important job and to meet the customer
 13 service needs of the store. You may be
 14 required to work overtime.
 15 Did you understand that you were, at
 16 times, going to be required to work overtime?
 17 A Yes.
 18 Q Did you report your overtime?
 19 A Well, with the exception of the -- the -- you
 20 know, the times I took it upon myself to come
 21 in on my -- on my day off and -- and try to get
 22 things caught up because of visits that we had
 23 coming up, my overtime was recorded.
 24 Q Okay. And could you turn to the next page,
 25 please, in the handbook. At the bottom of the

1 A That's correct.
 2 Q Okay. So the more accurate record of who
 3 worked when are the hourly time records that
 4 come from the computer, correct?
 5 MR. BAILEY: Objection. Vague. It calls
 6 for speculation.
 7 THE WITNESS: Can -- can I answer the
 8 question?
 9 MR. BAILEY: You can answer it, if you
 10 can, yeah.
 11 THE WITNESS: That -- that would be
 12 correct. That -- that would be most -- most
 13 accurate of what -- what took place during the
 14 day, as far as payroll goes.
 15 MS. TIFT: Okay.
 16 Q BY MS. TIFT: Did you participate in the AutoZone
 17 stock purchase program?
 18 A Yes, I did.
 19 Q For how long?
 20 A Well, I -- I've been a part of that program on
 21 more than one occasion. But all of my time
 22 that I spent here in Oregon, I -- I believe
 23 that -- that I had monies coming out of my
 24 check to participate in that program.
 25 Q Okay. And when you left AutoZone in February

Page 75

Page 77

1 page on the right-hand side, it's talking about
 2 work schedules. Do you see that?
 3 A Yes.
 4 MR. BAILEY: For the record, what page are
 5 we on, Counsel?
 6 MS. TIFT: 000050.
 7 Q BY MS. TIFT: And the very last two sentences
 8 say: Each AutoZone store sets its working
 9 hours based on the needs of AutoZone customers.
 10 All work hours, shift schedules and work areas
 11 are subject to change.
 12 Do you see that?
 13 A Yes.
 14 Q Now, there were things that were generated by
 15 AutoZone that were work schedules; correct?
 16 A Yes.
 17 Q Okay. And would you agree with me that a work
 18 schedule is a plan, it's what you're planning
 19 for?
 20 A Yeah.
 21 Q But things might change.
 22 A Yes. It's a guideline.
 23 Q Right. And also it might happen that someone
 24 is ill or needs to take leave or can't work
 25 their scheduled hours?

1 of 2006, did you cash your stock in?
 2 A Yes.
 3 Q Okay. And did you get a check for that?
 4 A Yes.
 5 Q Did you ever participate in any sales incentive
 6 programs where you get a -- I think they call
 7 it a spiff or a --
 8 A Yes.
 9 Q Okay. Did you get a check for that, ever?
 10 A It was part of my payroll check.
 11 Q Okay.
 12 A Yes. There was an itemized line on there
 13 that -- that showed what -- what you received.
 14 But it was part of your payroll check.
 15 Q Did you receive any of those incentive payments
 16 after you left AutoZone?
 17 A As far as a spiff?
 18 Q Yeah. Right.
 19 A No.
 20 Q Okay. Would you agree with me that the spiff
 21 was not due until the sales promotion ended;
 22 that was how it worked?
 23 A I -- I would agree with that.
 24 Q What job titles are you aware of in AutoZone in
 25 Oregon; what kinds of employees are there?

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 20 (Pages 74 to 77)
 EXHIBIT H
 Page 306

Michael Migis

May 20, 2008

Page 78

Page 80

1 A AutoZoners.
 2 Q Okay. So, hourly employees?
 3 A Hourly employees. Parts sales managers,
 4 manager, area advisor, district advisor,
 5 regional advisor, loss prevention, human
 6 resources, commercial specialists, commercial
 7 drivers. I don't know if they've implemented
 8 that, the merchandising pro. But if -- if --
 9 if that's been implemented again, then
 10 merchandising pro. Truck driver -- or --
 11 "truck driver" meaning the driver that brings
 12 the store's weekly truck from the DC, from the
 13 AutoZone warehouse. And I'm sure the regional
 14 advisor has secretaries and, you know, whatever
 15 positions are filled in -- in a district or
 16 regional office.
 17 Q Now, it's true, isn't it, that you never worked
 18 as a manager?
 19 A That's true.
 20 Q Okay. Or an area or district or regional
 21 advisor?
 22 A That's correct.
 23 Q Okay. And you never worked in loss prevention?
 24 A No, but I took a training class on it.
 25 Q Okay. You didn't work in human resources?

1 employees? If you know.
 2 A I do not know.
 3 Q Okay. Merchandising pros, are they hourly
 4 employees?
 5 A To my knowledge, they are.
 6 Q Okay. Commercial drivers, are they hourly
 7 employees?
 8 A Yes.
 9 Q Okay. Commercial specialists, are they hourly?
 10 A I believe they're salary.
 11 Q Okay. The administrative employees, they would
 12 probably be hourly?
 13 A I -- administrative?
 14 Q The secretaries and the file clerks.
 15 A I -- I -- to be honest with you, I -- I do not
 16 know.
 17 Q Okay. Human resources employees, do you know
 18 if they're salaried or --
 19 A That would be sal -- any -- any position
 20 manager and above would be a salaried position.
 21 Q How about loss prevention employees?
 22 A That's a salaried position.
 23 Q Do you know anything about work schedules or
 24 how truck drivers or commercial drivers,
 25 commercial -- or merchandising pros are paid?

Page 79

Page 81

1 A No.
 2 Q And you didn't have any of the administrative
 3 positions in -- like the secretaries or --
 4 A No.
 5 Q All right. You are not a commercial
 6 specialist?
 7 A No.
 8 Q You were not a commercial driver?
 9 A No.
 10 Q You were not a merchandising pro?
 11 A Not in Oregon.
 12 Q Okay. And you were not a truck driver?
 13 A That's correct.
 14 Q Okay. What's the difference between a
 15 commercial driver and a truck driver?
 16 A The commercial driver is a driver that delivers
 17 parts to small businesses around their area
 18 from the store level, from a hub store.
 19 Q Okay.
 20 A Whereas the -- the other truck driver I was in
 21 reference to is one that drives up in the 18 --
 22 or the -- you know, the 18-footers and -- and
 23 unloads eight pallets to your store. That's
 24 your freight for the week.
 25 Q Okay. Do you know, are truck drivers hourly

1 A I -- I don't understand the question.
 2 Q Do you know anything about their rules or how
 3 they keep track of their time?
 4 A It would be just clocking in and out, just like
 5 a regular employee, if it's a merchandising
 6 pro.
 7 Q Okay.
 8 A They would have a password and they -- they
 9 would be able to type in their password and --
 10 and if it's an hourly employee, they would have
 11 to clock in on the register, just like any
 12 other employee.
 13 Q And how do you know that that would apply to
 14 the truck drivers and the commercial drivers?
 15 A Well, the truck drivers, the -- the people that
 16 bring the weekly freight to the stores, they
 17 have to clock in at the register. And they
 18 have to clock out at the register.
 19 Q When?
 20 A When they arrive to the store --
 21 Q Okay.
 22 A -- to drop off the shipment, and after -- or
 23 when they're ready to leave the store after the
 24 shipment has been unloaded.
 25 Q And how do you know what they use to record

Michael Migis

May 20, 2008

Page 82

1 their start times?

2 A Because a member of management has to be at the

3 register with them to give them a password so

4 that they can access the clock-in and clock-out

5 procedure.

6 Q Would a commercial truck driver -- correct me

7 if I'm wrong -- but wouldn't they start at the

8 warehouse?

9 A A commercial truck driver?

10 Q Yeah, a truck driver. I'm sorry. Just a truck

11 driver.

12 A No, I -- I -- a commercial truck driver is just

13 an hourly employee.

14 Q Okay.

15 A He's just another employee in the store.

16 Q Okay.

17 A But his primary duties are to deliver

18 merchandise to small businesses around the

19 area.

20 Q Okay.

21 A But he's still an hourly employee.

22 Q And do you know how those people organize their

23 lunch times or take breaks?

24 A They're part of the -- the store schedule.

25 They're two different departments. But when it

Page 83

1 comes to scheduling, they're the same -- it's

2 the same.

3 Q So there would be a schedule that said when

4 they were expected -- about when they were

5 expected?

6 A The same matrix as for the rest of the

7 employers or employees.

8 Q Okay. Now, the truck drivers that bring eight

9 pallets to the store, do you know how they

10 record their start times?

11 A At the register.

12 Q Wouldn't they arrive at the store with stuff

13 already on the truck?

14 A Yes.

15 Q So where did they start?

16 A From an AutoZone distribution center.

17 Q Okay. So do you know how they record their

18 time at the AutoZone distribution center, if

19 they do?

20 A I'm sure they do, but I -- I don't know the

21 exact procedure. It may be just signing a log

22 at the check-in/checkout booth as they're

23 leaving the building.

24 Q Okay. Do you know anything about how those

25 people keep track of their lunches or breaks?

Page 84

1 A No.

2 Q Okay. Let's say that we were working at an

3 AutoZone store and a customer came in, a good

4 customer, who needed a part, but there isn't

5 one in stock. What would happen?

6 A Well, we would try to locate the part for them

7 locally. If -- and then send the customer to

8 another location to get that part. But, you

9 know, there's all kinds of different scenarios

10 for that.

11 Q In your experience, how often did that happen;

12 two times a week, 10 times a week?

13 A Did what happen?

14 Q Customer comes in and wants a particular thing,

15 and it's not in stock.

16 A All the time.

17 Q Okay. You mentioned early on that there were

18 times when employees would drive a part from

19 one store to another.

20 A That's correct.

21 Q Why would you do that?

22 A To help a customer.

23 Q And how often did that occur, that an employee

24 would drive a part from one store to another?

25 A Many times.

Page 85

1 Q How many times did you do it?

2 A I could not tell you with any amount of

3 accuracy how times I did it.

4 Q Did you do it more than once a week, do you

5 think, on average?

6 A Probably two or three times a week, would be

7 more accurate.

8 Q And do you think you did it more or less than

9 other employees?

10 A That's hard for me to determine, if I'm only at

11 one location -- I --

12 Q Okay.

13 A -- I -- I would not be able to see what they're

14 doing, or see their paperwork.

15 Q And you said you didn't record your time for

16 that?

17 A No.

18 Q Why not?

19 A I wasn't on the clock when I was doing it.

20 Q Well, couldn't you ask to be paid?

21 A I suppose I could have. It -- it was

22 situations where I -- give you a example. I

23 would be called at home at 7:30 in the morning,

24 for example. I was scheduled to work at 8:00.

25 And it was: Mike, stop at this store. Pick

22 (Pages 82 to 85)

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EXHIBIT H
Page 506

Michael Migis

May 20, 2008

Page 180

C E R T I F I C A T E

I, Charlotte A. Powers, CSR No. 90-0050, do hereby certify that, pursuant to stipulation of counsel hereinbefore set out, MICHAEL MIGIS personally appeared before me at the time and place mentioned in the caption herein; that the witness was by me first duly sworn on oath, and examined upon oral interrogatories propounded by counsel; that said examination, together with the testimony of said witness, was taken down by me in stenotype and thereafter reduced to typewriting; and, that the foregoing transcript, pages 1 to 179, both inclusive, constitutes a full, true and accurate record of said examination of and testimony given by said witness, and all other proceedings had during the taking of said deposition, and of the whole thereof, to the best of my ability.

Witness my hand at Portland, Oregon, this 28th day of May, 2008.

*Charlotte A. Powers*

Charlotte A. Powers, RMR

CSR No. 90-0050

Beovich Walter & Friend

EXHIBIT H
Page 6 of 6

jm

RECEIVED
CIRCUIT COURT
MULTNOMAH COUNTY
08 APR -3 AM 11:54
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IN REGISTER BY EG

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

MICHAEL MIGIS, individually, and on
behalf of all others similarly situated,

Plaintiff,

v.

AUTOZONE, INC.,

Defendant.

Case No. 0711-13S31

ORDER ON PLAINTIFF'S FIRST
MOTION FOR AN ORDER
COMPELLING DISCOVERY, AND
DETERMINING THE SUFFICIENCY
OF DEFENDANT'S RESPONSES TO
PLAINTIFF'S REQUESTS FOR
ADMISSION

~~PROPOSED~~



THIS MATTER having come before this Court upon Plaintiff's *First Motion for an Order Compelling Discovery, and Determining the Sufficiency of Defendant's Responses to Plaintiff's Requests for Admission*, and the Court having heard oral argument on March 7, 2008, reviewed the file, and being fully advised of the premise thereof, for the reasons stated on the record:

It is HEREBY ORDERED that:

- (1) Plaintiff's motion to deem Plaintiff's Requests For Admissions admitted is DENIED.
- (2) Defendant produce all documents in response to Request For Production Nos. 2, 4 and 6 in Plaintiff's First Set of Requests For Production, within 15

1 business days from the date of hearing on this matter, provided that these
2 Requests shall be limited to Oregon-based AutoZone employees paid on an hourly
3 basis.

4
5 (3) Defendant produce all documents responsive to Request For Production Nos.
6 7 and 8 in Plaintiff's Second Set of Requests for Production, within 15 business
7 days from the date of hearing on this matter.

8
9 (4) The parties confer on the scope of production for Request For Production Nos.
10 1 - 6 in Plaintiff's Second Set of Requests For Production. The Court has
11 subsequently been informed that Plaintiff and Defendant agree to the scope of
12 those Requests as follows, and Defendant shall produce all documents responsive
13 to the Requests, as modified, within 20 business days from the date of hearing on
14 this matter.

15 (a) Request No. 1 (transportation and driving policies and/or procedures): The
16 temporal scope of this Request shall be a total of one (1) year comprised of
17 the following time periods: from May 1, 2005 through August 2005; from
18 November 1, 2005 through February 2006; and from May 1, 2006 through
19 August 2006. This Request will be limited to documents representing a
20 complete set of the requested policies and procedures from the earliest date
21 set forth above, through the latest date set forth above, inclusive of any
22 changes to those policies and procedures.

23 (b) Request No. 2 (mileage reimbursement policy and/or procedure): The
24 temporal scope of this Request shall be a total of one (1) year comprised of
25 the following time periods: from May 1, 2005 through August 2005; from
26 November 1, 2005 through February 2006; and from May 1, 2006 through

Page 2 -

ORDER ON PLAINTIFF'S FIRST MOTION FOR ORDER COMPELLING DISCOVERY

1 August 2006. This Request will be limited to documents representing a
2 complete set of the requested policies and procedures from the earliest date
3 set forth above, through the latest date set forth above, inclusive of any
4 changes to those policies and procedures.

5 (c) Request No. 3 (merchandise and/or parts delivery and pick-up schedule(s)):

6 No changes; Defendant shall respond to the Request as drafted.

7 (d) Request No. 4 (documents and reports including Missed Lunch Reports and

8 Lunch Variance Reports): The temporal scope of this Request will be a total

9 of one (1) year comprised of the following time periods: from May 1, 2005

10 through August 2005; from November 1, 2005 through February 2006; and

11 from May 1, 2006 through August 2006.

12 (e) Request No. 5 (Weekly Schedule reports referencing Plaintiff Migis's

13 approved and unapproved work schedules): No changes; Defendant shall

14 respond to the Request as drafted.

15 (f) Request No. 6 (documents and reports reflecting weekly summarization of

16 hours worked by Plaintiff Migis): No changes; Defendant shall respond to the

17 Request as drafted.

18
19 SIGNED on this 2 day of April 2008.

20
21
22 THE HON. JEROME LABARRE
23 Multnomah Co. Circuit Court

24 ///

25 ///

26 ///

1 APPROVED AS TO FORM:

2 BAILEY, PINNEY & ASSOCIATES, LLC

3

4 /s/

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12

/s/

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Of Attorneys for Defendant

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Page 4 -

ORDER ON PLAINTIFF'S FIRST MOTION FOR ORDER COMPELLING DISCOVERY

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EXHIBIT I
Page 4 of 4

1
2 IN THE CIRCUIT COURT OF THE STATE OF OREGON
3
4 FOR THE COUNTY OF MULTNOMAH
5

6 MICHAEL MIGIS, individually, and on
7 behalf of all other persons similarly
8 situated,,
9

10 Plaintiff,
11

12 vs.
13

14 AUTOZONE INC., a Nevada
15 Corporation,,
16

17 Defendant.
18

No. 0711-13531

**DEFENDANT'S FIRST SUPPLEMENTAL
OBJECTIONS AND RESPONSES TO
PLAINTIFF'S SECOND SET OF REQUESTS
FOR PRODUCTION OF DOCUMENTS**

19 Defendant AutoZone, Inc. ("Defendant") hereby submits its objections and responses to
20 Plaintiff's Second Set of Requests for Production of Documents as follows:
21

22 **GENERAL OBJECTIONS**
23

24 The following objections apply generally to all of Plaintiff's discovery requests in this
25 lawsuit:
26

27 (a) Objections to Scope of Discovery Requests. Defendant objects to all discovery
28 requests to the extent they purport to require any actions not required by the Oregon Rules of Civil
29 Procedure, the Uniform Trial Court Rules, or any local rules. Without limiting the generality of this
30 objection, Defendant objects to all discovery requests to the extent that they (1) go beyond the scope
31 of discovery provided by the Oregon Rules of Civil Procedure, (2) are not reasonably calculated to
32 lead to the discovery of admissible evidence, and/or (3) purport to impose a duty of supplementation
33 greater than that imposed by the Oregon Rules of Civil Procedure.
34

35 (b) Privilege and Trial Preparation Materials. Defendant objects to all discovery requests
36 to the extent they call for information or documents that fall within any relevant privilege (including

1 without limitation the attorney-client privilege), that are within the work product doctrine, or that
2 constitute trial preparation materials.

3 (c) No Waiver. Nothing set forth in Defendant's specific objections, general objections
4 or responses is intended as or should be construed as a waiver of these general objections, or of any
5 specific objections set forth.

6 (d) Reservation of Rights. Defendant reserves the right to move later for a protective
7 order or otherwise to seek relief from the court if the parties are unable to resolve Defendant's
8 objections by agreement.

9 (e) Publicly Available Documents. Defendant objects to producing publicly available
10 documents (including without limitation court records) that are, due to their public availability,
11 equally available to the requesting party.

12 (f) Pending Motion to Consolidate and Stay. Defendant objects to responding to these
13 requests in their entirety in light of Defendant's Motion to Consolidate and Stay, which is currently
14 pending before the Court. If this matter survives Defendant's Motion to Consolidate and Stay,
15 Defendant will supplement its responses to these requests.

16 (g) Pending Stay of Discovery. Defendant further objects to these discovery requests to
17 the extent that they seek to evade Judge Kantor's January 27, 2006 ruling in *Joarnt et al. v.*
18 *AutoZone, Inc.* ("Joarnt Action") that all discovery in that matter has been stayed during the
19 pendency of an appeal to the Oregon Court of Appeals in the Joarnt Action.

20 (h) Objections to Requests Exceeding Pre-Certification Issues. Defendant objects to the
21 discovery requests to the extent they (1) seek information about current and former employees who
22 are not class representatives and (2) exceed the issue of class certification. To the extent not
23 objectionable for other reasons, Defendant will answer and respond to the requests as they apply to
24 the class representative, Plaintiff Migis.

1 (i) Amendment/Supplementation. This matter presently is still being investigated by
2 Defendant and its counsel, and Defendant therefore reserves the right to amend and supplement its
3 responses as reasonably may be necessary.

4 (j) No Private Right of Action. Defendant further objects to these discovery requests to
5 the extent they seek information about alleged meal period violations insofar as Plaintiffs do not
6 have a private right of action for such a claim. *See Gafur v. Legacy Good Samaritan Hospital and*
7 *Medical Center*, 213 Or. App. 343 (2007).

8 (k) Electronic Discovery. Defendant objects to these discovery requests to the extent
9 they seek electronic discovery as being overbroad and unduly burdensome and the need for any
10 electronic discovery does not outweigh the burdens and hardships to Defendant of searching
11 electronic information.

12 (l) To the extent that any discovery request seeks documents that are also sought by or
13 identified pursuant to any other request, Defendant declines to produce or identify multiple copies of
14 such documents, and Defendant states that each document produced or identified pursuant to any
15 request is also produced pursuant to any other request to which it is responsive.

16 Defendant's response to each request specifically incorporates these General Objections by
17 this reference.

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1 *AutoZone, Inc.* Without waiving such objection, see Defendant's Response to Plaintiff Joarnt and
2 Yamaoka's Third Requests for Production, RFP No. 8, in Cause No. 053-02795.

3 **SUPPLEMENTAL RESPONSE:** The policies referenced above are attached in response to
4 RFP No. 1. No other policies on these topics has been located, but Defendant continues to search
5 and will provide any updated policies.

6
7 **REQUEST FOR PRODUCTION NO. 3:** Produce all documents containing or referencing
8 Defendant's daily merchandise and/or parts delivery and pick-up schedule in place during the course
9 of Plaintiff's employment with Defendant for all Defendant Stores where Plaintiff worked and
10 delivered.

11 **RESPONSE:** Defendant incorporates by reference its General Objections as though fully set
12 forth herein. Defendant further objects to this request to the extent it is overbroad, unduly
13 burdensome, and overlaps with discovery that has been stayed by Judge Kantor in *Joarnt et al. v.*
14 *AutoZone, Inc.* Without waiving such objection, see Defendant's Response to Plaintiff Joarnt and
15 Yamaoka's Third Requests for Production, RFP No. 9, in Cause No. 053-02795.

16 **SUPPLEMENTAL RESPONSE:** The delivery schedules are not retained as a matter of
17 practice or policy. AutoZone has conducted a diligent search for these schedules at its headquarters,
18 and none were located. Defendant believes that some copies may be retained, on an individual basis
19 and in no particular order, at various stores where Plaintiff worked. Defendant will search for these
20 schedules at individual stores to determine whether any examples are in existence.

21
22 **REQUEST FOR PRODUCTION NO. 4:** Produce all documents and reports reflecting
23 dates and times when any AutoZone employees working in the State of Oregon missed their meal
24 periods, for the period of time from three (3) years prior to the filing of the Complaint, up to present.

1 This Request includes any and all, if applicable, "Missed Lunch Reports" and "Lunch Variance
2 Reports."

3 **RESPONSE:** Defendant incorporates by reference its General Objections as though fully set
4 forth herein. Defendant further objects to this request to the extent it is overbroad, unduly
5 burdensome, and overlaps with discovery that has been stayed by Judge Kantor in *Joarnt et al. v.*
6 *AutoZone, Inc.* Without waiving such objection, see Defendant's Response to Plaintiff Joarnt and
7 Yamaoka's Fourth Requests for Production, RFP No. 7, in Cause No. 053-02795.

8 **SUPPLEMENTAL RESPONSE:** With respect to Plaintiff Migis, *see*, attached AZ/MIGIS
9 000551.

10
11 **REQUEST FOR PRODUCTION NO. 5:** Produce all "Weekly Schedule" reports
12 referencing Plaintiff's work schedule, both approved and unapproved, for the period of time from
13 three (3) years prior to the filing of the Complaint, up to present.

14 **RESPONSE:** Defendant incorporates by reference its General Objections as though fully set
15 forth herein. Defendant further objects to this request to the extent it is overbroad, unduly
16 burdensome, and overlaps with discovery that has been stayed by Judge Kantor in *Joarnt et al. v.*
17 *AutoZone, Inc.* Without waiving such objection, see Defendant's Response to Plaintiff Joarnt and
18 Yamaoka's Third Requests for Production, RFP No. 11, in Cause No. 053-02795.


19 **SUPPLEMENTAL RESPONSE:** Work schedules are not retained as a matter of practice
20 or policy. AutoZone has conducted a diligent search for these schedules at its headquarters, and
21 none were located. Defendant believes that some copies may be retained, on an individual basis and
22 in no particular order, at various stores where Plaintiff worked. Defendant will search for these
23 schedules at individual stores to determine whether any examples are in existence.

1 **REQUEST FOR PRODUCTION NO. 8:** Produce all documents that identify, or which
 2 record or can be used to identify, the names of the persons activating and/or deactivating security
 3 systems at stores in which Plaintiff worked for AutoZone during Plaintiff's employment period.

4 **RESPONSE:** Defendant incorporates by reference its General Objections as though fully set
 5 forth herein. Defendant further objects to this request to the extent it is overbroad, unduly
 6 burdensome, and overlaps with discovery that has been stayed by Judge Kantor in *Joarnt et al. v.*
 7 *AutoZone, Inc.* Without waiving such objection, see Defendant's Response to Plaintiff Joarnt and
 8 Yamaoka's Fourth Requests for Production, RFP No. 12, in Cause No. 053-02795.

9 **SUPPLEMENTAL RESPONSE:** Defendant has been unable to identify records related to
 10 Plaintiff Migis responsive to this request. Defendant continues to search and will supplement to the
 11 extent that records are identified.

12
 13 Dated: March 28, 2008

14
 15 
 16 Leigh Ann Collings Tift OSB 05473
 17 Douglas S. Parker OSB No.82101
 18 LITTLER MENDELSON
 19 A Professional Corporation

20
 21 Attorneys for Defendant
 22 Autozone Inc.
 23
 24
 25
 26

ENTERED
MAR 29 2006
IN REGISTER BY RK

FILED
06 MAR 27 AM 11:23
FOR MULTNOMAH COUNTY

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

RICHARD JOARNT and BERT
YAMAOKO, individually and on behalf of all
others similarly situated,

Plaintiffs,

v.

AUTOZONE, INC., a Foreign Corporation,

Defendant.

No. 0503-02795

**ORDER ON PLAINTIFFS' MOTIONS
FOR ORDER REQUIRING
DEFENDANT TO PRESERVE
EVIDENCE AND FOR PROTECTIVE
ORDER, AND ON DEFENDANT'S
MOTION TO ENJOIN PLAINTIFFS
FROM CONTACTING
REPRESENTED PARTIES AND
MOTION FOR PROTECTIVE
ORDER LIMITING PLAINTIFFS'
CONTACT WITH PUTATIVE CLASS
MEMBERS**

THIS MATTER, having come before the Court upon Plaintiffs' and Defendant's above-referenced Motions, and the Court having reviewed the file, and being fully advised of the premise thereof during hearing of these Motions on January 27, 2006; the Court hereby **ORDERS** that:

1. Defendant's Motion to Enjoin Plaintiffs from Contacting Represented Parties and Motion for Protective Order Limiting Plaintiffs' Contact with Putative Class Members, is **DENIED**. Plaintiffs are allowed to conduct investigation and contact AutoZone employees and store managers as part of such investigation; **PROVIDED**, however, that such contact include a disclosure that the investigation is related to the employee's experience as an hourly employee. **MOREOVER**, Plaintiffs are not entitled to directly contact current district managers or other current employees occupying positions of authority above the district manager level, regarding this case without permission of Defendant and/or the Court except to

Page 1 -

ORDER ON PLAINTIFFS' MOTIONS FOR ORDER REQUIRING DEFENDANT TO PRESERVE EVIDENCE
AND FOR PROTECTIVE ORDER, AND ON DEFENDANT'S MOTION TO ENJOIN PLAINTIFFS FROM
CONTACTING REPRESENTED PARTIES AND MOTION FOR PROTECTIVE ORDER LIMITING PLAINTIFFS'
CONTACT WITH PUTATIVE CLASS MEMBERS

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EXHIBIT K
Page 1 of 3

1 determine if the person is a district manager or other person with whom contact is restricted.
2 Defendant shall provide Plaintiffs with a list of such individuals whom Defendant believes
3 Plaintiffs are not entitled to contact, PROVIDED, HOWEVER, that Defendant's duty to
4 provide this information is STAYED in accordance with Paragraph 4 of this Order.

5 2. In regards to Plaintiffs' Motion for Order Requiring Defendant to Preserve
6 Evidence and Motion for Protective Order:

7 a. Plaintiffs' Motion for Protective Order (restricting Defendant's
8 communications with putative class members) is DENIED. Defendant may conduct
9 investigation to prosecute and defend their claims and defenses; PROVIDED, however,
10 Defendant does not try to persuade any putative class members to not participate in the class.

11 b. Plaintiffs' Motion for Order Requiring Defendant to Preserve Evidence
12 is hereby GRANTED to the extent that Defendant will preserve all contents of currently-
13 existing (from November 2004 and later) Oregon AutoZone store "period boxes," or any
14 future boxes that are created and maintained during the course of this lawsuit, for all
15 AutoZone stores in the State of Oregon. FURTHERMORE, Defendant will arrange for the
16 storage of those boxes and their contents in such a way that provides Plaintiffs reasonable
17 access to review and copy the contents of those boxes. Plaintiffs are not entitled to documents
18 containing confidential information that is entirely unrelated to the claims or defenses in this
19 lawsuit. If the parties disagree over the discoverability of one or more documents contained
20 in any of the period boxes, Plaintiffs are entitled to copy that document or documents and
21 move the Court for a ruling as to the disputed document or documents' discoverability.

22 3. All requests for costs and attorneys fees and/or sanctions as made in the above-
23 referenced Motions are DENIED.

24 ///

25 ///

26 ///

Page 2 -

ORDER ON PLAINTIFFS' MOTIONS FOR ORDER REQUIRING DEFENDANT TO PRESERVE EVIDENCE
AND FOR PROTECTIVE ORDER, AND ON DEFENDANT'S MOTION TO ENJOIN PLAINTIFFS FROM
CONTACTING REPRESENTED PARTIES AND MOTION FOR PROTECTIVE ORDER LIMITING PLAINTIFFS'
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EXHIBIT K
Page 2 of 3

4. This case is STAYED in its entirety pending resolution of Plaintiff's appeal of this Court's order on Defendant's Motion for Judgment on the Pleadings. This stay, however, does not affect the parties' respective rights to conduct appropriate investigation.

ORDERED this 27th day of March 2006.


THE HONORABLE HENRY KANTOR
MULTNOMAH CO. CIRCUIT COURT JUDGE

SUBMITTED BY:


SHAUNA M. SJOSROM, OSB 04418
Of Attorney for Plaintiffs

Page 3 -

ORDER ON PLAINTIFFS' MOTIONS FOR ORDER REQUIRING DEFENDANT TO PRESERVE EVIDENCE AND FOR PROTECTIVE ORDER, AND ON DEFENDANT'S MOTION TO ENJOIN PLAINTIFFS FROM CONTACTING REPRESENTED PARTIES AND MOTION FOR PROTECTIVE ORDER LIMITING PLAINTIFFS' CONTACT WITH PUTATIVE CLASS MEMBERS

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EXHIBIT K
Page 3 of 3

STORE	MAIL ID	EMP NAME	NO LUNCH	SHORT LUNCH	LONG LUNCH
2203	TPqGlr	HAHAJ, BRANDON	2	0	0
2203	TXNqj7	LUNA, NOE	1	0	0
2203	TXsCpS	DE LA VEGA, JAVIER	2	4	0
2203	TYmHgM	BAZANTE, PEDRO	1	0	0
2203	Te8GIU	ECHEVERRIA, ANDRES	2	0	0
2203	TeKf0H	SARDINETA, DICK	2	1	0
2203	TeUBi5	RHEE, BRIAN	1	0	0
2203	TeWWEc	LEACH, JOE	12	1	2
2203	TzpTm1	TREJO, ABRAHAM	4	0	0
2213	TtDjll	PAGARIGAN, JOHN	0	1	2
2213	TX5Ex	STRINGER, CALEB	1	2	0
2213	TzBe0I	ACKERMAN, CHRISTOPHER	1	0	1
2213	TzJbTk	KEY, ROBERT	0	1	2
2214	TMK8Lw	BARNHURST, JOHN	2	0	0
2214	TYvyVr	THOMAS, ANDREW	0	0	1
2214	TeMyoK	CRAMER, JOSHUA	6	3	2
2214	Ted9nn	JAIMES, JODI	4	3	3
2214	TedZ6I	RICHMOND, JEFFREY	1	2	0
2214	TetBE1	COSTA, MEGAN	3	1	2
2214	TewNF7	DODGE, JUSTIN	3	4	3
2216	TZbeVP	HEREDIA, JONATHAN	7	4	1
2216	TeKo0y	VEGA, NERI	6	0	0
2216	TeMTZ4	KEITHLEY, MARION	2	12	1
2216	TeUldR	WHITING, JOSHUA	1	3	2
2216	TeXUa	SANFILIPPO, VICTORIA	5	2	6
2216	TeaMdH	LIBAL, DAMIEN	2	6	0
2216	Tew7S3	PEARCE, SARAH	1	1	0
2216	TewOf	FORSYTHE, JON	11	7	3
2216	Texry1	THIERRY, SHELBY	8	5	1
2216	Tubft8	DAVILA, RAFAEL	1	0	0
2216	TzfoGe	TREJO, ROMUALDO	9	0	0
2217	TYtgGi	BENAVIDES, HERIBERTO	3	5	0
2217	TeKLai	PEREZ, ADRIAN	3	2	0
2217	TeaEVo	ENSEY, EVAN	1	0	0
2217	Tet0MC	UPTON, CONAN	3	0	2
2217	Tx1cki	MONACO, NICHOLAS	3	2	0
2219	TMe3Zp	BAIRD, JOSHUA	1	7	1
2219	Tetnoz	JACKMAN, RYAN	2	13	5
2219	Tebd8	DUHRKOOP, CARISSA	3	11	4
2219	Tew63g	BRUNER, MICHAEL	1	0	0
2219	TexSli	WEEDMAN, EMILY	7	1	5
2219	TnqagL	BRAUN, JAMES	0	1	0
2219	TsPlup	GUERRERO, ALFREDO	4	2	0
2222	TY2pBs	GOMEZ, ERICA	4	0	0
2222	TeUW23	WITT, MATTHEW	1	0	0
2222	TeYkcC	HASKELL, JANELLE	4	0	1
2222	TetNc	JACK, RACHEL	4	0	0
2222	TtDjll	PAGARIGAN, JOHN	0	4	3
2222	TX5Ex	STRINGER, CALEB	0	2	1
2222	TtaXVV	AGUILAR, JOE	1	3	1
2222	Ttaplz	STEENBURGH, GLEN	6	5	1

EXHIBIT 2Page 1016

AZ/MIGIS 0001220

SHORT LUNCH	NO LUNCH	LONG LUNCH
335	334	246

EXHIBIT L

Page 2 of 6

AZ/MIGIS 0001223

STORE	MAIL ID	EMP NAME	AT ACTION DESC	AT REASON DESC	num occurrences
2216	Texzy1	THIERRY, SHELBY	LONG LUNCH	AUTOZONER TRADED SHIFT	1
2222	TIDII	PAGARIGAN, JOHN	LONG LUNCH	AUTOZONER TRADED SHIFT	1
2213	TzBe01	ACKERMAN, CHRISTOPHER	LONG LUNCH	COVERED FOR ABSENT AUTOZONER	1
2216	TeXLUA	SANFILIPPO, VICTORIA	LONG LUNCH	COVERED FOR ABSENT AUTOZONER	1
2216	TewOI	FORSYTHE, JON	LONG LUNCH	COVERED FOR ABSENT AUTOZONER	1
2225	TedY1	HAGEN, ADAM	LONG LUNCH	COVERED FOR ABSENT AUTOZONER	1
2225	TexS2G	BIGGS, KELLY	LONG LUNCH	COVERED FOR ABSENT AUTOZONER	1
2228	TevHJT	HAYASHI, PATRICK	LONG LUNCH	COVERED FOR ABSENT AUTOZONER	1
2228	TIBZot	MARTINEZ, GUADALUPE	LONG LUNCH	COVERED FOR ABSENT AUTOZONER	1
2232	TIE2B	MCCARTER, DAVE	LONG LUNCH	COVERED FOR ABSENT AUTOZONER	1
2233	TewWau	LANE, GARY	LONG LUNCH	COVERED FOR ABSENT AUTOZONER	1
2214	TewNF7	DODGE, JUSTIN	LONG LUNCH	DEFER	1
2226	TQOKZ5	HOPPER, RYAN	LONG LUNCH	DEFER	1
2226	TedLs	HADLEY, JUSTIN	LONG LUNCH	DEFER	1
2226	TIORYm	COLE, CONRAD	LONG LUNCH	DEFER	1
2213	TIDJ	PAGARIGAN, JOHN	LONG LUNCH	EXCUSED - JOB RELATED	1
2213	TzJbTk	KEY, ROBERT	LONG LUNCH	EXCUSED - JOB RELATED	1
2214	TeMyoK	GRAMER, JOSHUA	LONG LUNCH	EXCUSED - JOB RELATED	1
2214	TewNF7	DODGE, JUSTIN	LONG LUNCH	EXCUSED - JOB RELATED	1
2216	TeXLUA	SANFILIPPO, VICTORIA	LONG LUNCH	EXCUSED - JOB RELATED	1
2216	TewOI	FORSYTHE, JON	LONG LUNCH	EXCUSED - JOB RELATED	1
2217	TedIMC	UPTON, CONAN	LONG LUNCH	EXCUSED - JOB RELATED	1
2225	TexS2G	BIGGS, KELLY	LONG LUNCH	EXCUSED - JOB RELATED	1
2226	TIVDiv	TENNYSON, NICOLE	LONG LUNCH	EXCUSED - JOB RELATED	1
2226	TIORYm	COLE, CONRAD	LONG LUNCH	EXCUSED - JOB RELATED	1
2227	TeLWVa	MORALES, CARLOS	LONG LUNCH	EXCUSED - JOB RELATED	1
2228	TLaGB	MARTINEZ, HERMAN	LONG LUNCH	EXCUSED - JOB RELATED	1
2228	TePyod	FEROE, DARWIN	LONG LUNCH	EXCUSED - JOB RELATED	1
2228	TersnS	NASH, TRAVIS	LONG LUNCH	EXCUSED - JOB RELATED	1
2228	Tebl	THARP, MICHELLE	LONG LUNCH	EXCUSED - JOB RELATED	1
2228	Tex3Xd	PERSONS, KIMBERLY	LONG LUNCH	EXCUSED - JOB RELATED	1
2228	TzJTSw	SHARTNER, DIANA	LONG LUNCH	EXCUSED - JOB RELATED	1
2232	TLaGB	CLEVINGER, DUSTIN	LONG LUNCH	EXCUSED - JOB RELATED	1
2232	TIE2B	MCCARTER, DAVE	LONG LUNCH	EXCUSED - JOB RELATED	1
2233	TewWau	LANE, GARY	LONG LUNCH	EXCUSED - JOB RELATED	1
2233	TewWGR	HIEB, ROBERT	LONG LUNCH	EXCUSED - JOB RELATED	1
2235	TeblDg	EASTLUND, PATRICK	LONG LUNCH	EXCUSED - JOB RELATED	1
2236	Ted5Nr	KLEIN, SCOTT	LONG LUNCH	EXCUSED - JOB RELATED	1
2236	Tex3aO	MIGIS, MICHAEL	LONG LUNCH	EXCUSED - JOB RELATED	1
2238	TegQLV	KREICK, KENNETH	LONG LUNCH	EXCUSED - JOB RELATED	1
2203	TeWWEc	LEACH, JOE	LONG LUNCH	EXCUSED - PERSONAL	1
2214	Ted8nn	JAMES, JODI	LONG LUNCH	EXCUSED - PERSONAL	1
2216	TeXLUA	SANFILIPPO, VICTORIA	LONG LUNCH	EXCUSED - PERSONAL	1
2217	TedIMC	UPTON, CONAN	LONG LUNCH	EXCUSED - PERSONAL	1
2219	Tex3Il	WEEDMAN, EMILY	LONG LUNCH	EXCUSED - PERSONAL	1
2226	TePieB	PARGA JR, JUAN	LONG LUNCH	EXCUSED - PERSONAL	1
2226	Tex3wK	HOLDIMAN, KELLY	LONG LUNCH	EXCUSED - PERSONAL	1
2226	TQOKZ5	HOPPER, RYAN	LONG LUNCH	EXCUSED - PERSONAL	1
2228	TLaGB	MARTINEZ, HERMAN	LONG LUNCH	EXCUSED - PERSONAL	1
2228	TePyod	FEROE, DARWIN	LONG LUNCH	EXCUSED - PERSONAL	1
2228	Tex3Xd	PERSONS, KIMBERLY	LONG LUNCH	EXCUSED - PERSONAL	1
2233	TewWau	LANE, GARY	LONG LUNCH	EXCUSED - PERSONAL	1
2235	TeblDg	EASTLUND, PATRICK	LONG LUNCH	EXCUSED - PERSONAL	1
2236	Ted5Nr	KLEIN, SCOTT	LONG LUNCH	EXCUSED - PERSONAL	1
2236	Tex3aO	MIGIS, MICHAEL	LONG LUNCH	EXCUSED - PERSONAL	1
2238	TegQLV	KREICK, KENNETH	LONG LUNCH	EXCUSED - SICK/ACCIDENT	1
2233	TewWau	LANE, GARY	LONG LUNCH	MANAGEMENT CHANGE DUE TO COVER	1
2203	TeWWEc	LEACH, JOE	LONG LUNCH	MANAGEMENT CHANGE DUE TO SALES	1
2213	TIDII	PAGARIGAN, JOHN	LONG LUNCH	MANAGEMENT CHANGE DUE TO SALES	1
2214	TYvyVr	THOMAS, ANDREW	LONG LUNCH	MANAGEMENT CHANGE DUE TO SALES	1
2214	Ted8nn	JAMES, JODI	LONG LUNCH	MANAGEMENT CHANGE DUE TO SALES	1
2214	TeIE1	COSTA, MEGAN	LONG LUNCH	MANAGEMENT CHANGE DUE TO SALES	1
2214	TewNF7	DODGE, JUSTIN	LONG LUNCH	MANAGEMENT CHANGE DUE TO SALES	1
2216	TZbeVP	HEREDIA, JONATHAN	LONG LUNCH	MANAGEMENT CHANGE DUE TO SALES	1
2216	TeMTZ4	KEITHLEY, MARION	LONG LUNCH	MANAGEMENT CHANGE DUE TO SALES	1
2216	TeJldR	WHITING, JOSHUA	LONG LUNCH	MANAGEMENT CHANGE DUE TO SALES	1
2219	TeWoz	JACKMAN, RYAN	LONG LUNCH	MANAGEMENT CHANGE DUE TO SALES	1
2219	TeWoz	DIHRKOOP, CARISSA	LONG LUNCH	MANAGEMENT CHANGE DUE TO SALES	1

EXHIBIT LPage 3 of 6

AZMIGIS 0001224

2228	TedLs	HADLEY, JUSTIN	SHORT LUNCH	EXCUSED - JOB RELATED	1
2228	TZY4En	TRAYER, RAYMOND	SHORT LUNCH	EXCUSED - JOB RELATED	1
2227	THCCPy	WALKER, ANDREW	SHORT LUNCH	EXCUSED - JOB RELATED	2
2228	TePyod	FEROE, DARWIN	SHORT LUNCH	EXCUSED - JOB RELATED	1
2228	TevMTn	ROSS, FRANK	SHORT LUNCH	EXCUSED - JOB RELATED	1
2229	TaZqt	MARTINEZ, GUADALUPE	SHORT LUNCH	EXCUSED - JOB RELATED	1
2233	TeWfeti	LANE, GARY	SHORT LUNCH	EXCUSED - JOB RELATED	1
2233	TeWk9R	HIEB, ROBERT	SHORT LUNCH	EXCUSED - JOB RELATED	1
2239	TetbDq	EASTLUND, PATRICK	SHORT LUNCH	EXCUSED - JOB RELATED	1
2235	Tew7B1	GILLESPIE, HEATHER	SHORT LUNCH	EXCUSED - JOB RELATED	2
2238	TeqQLV	KREICK, KENNETH	SHORT LUNCH	EXCUSED - JOB RELATED	1
2216	TeMTZ4	KEITHLEY, MARION	SHORT LUNCH	EXCUSED - PERSONAL	1
2216	Teqy1	THIERRY, SHELBY	SHORT LUNCH	EXCUSED - PERSONAL	1
2231	TXRWb1	MUNOZ, CARLOS	SHORT LUNCH	EXCUSED - SUSPENSION	1
2214	Ted9nn	JAIMES, JODI	SHORT LUNCH	MANAGEMENT CHANGE DUE TO COVER	2
2214	TedZ61	RICHMOND, JEFFREY	SHORT LUNCH	MANAGEMENT CHANGE DUE TO COVER	1
2214	TewNF7	DODGE, JUSTIN	SHORT LUNCH	MANAGEMENT CHANGE DUE TO COVER	1
2216	TeXUJA	SANFILIPPO, VICTORIA	SHORT LUNCH	MANAGEMENT CHANGE DUE TO COVER	1
2228	TQQKZ5	HOPPER, RYAN	SHORT LUNCH	MANAGEMENT CHANGE DUE TO COVER	1
2228	TYFFu1	GONZALEZ, CARLOS	SHORT LUNCH	MANAGEMENT CHANGE DUE TO COVER	2
2229	TYNHD	NARAYAN, RAJ	SHORT LUNCH	MANAGEMENT CHANGE DUE TO COVER	1
2229	TymHgM	BAZANTE, PEDRO	SHORT LUNCH	MANAGEMENT CHANGE DUE TO COVER	1
2228	TewHJT	HAYASHI, PATRICK	SHORT LUNCH	MANAGEMENT CHANGE DUE TO COVER	1
2232	TLGkaA	CLEVENGER, DUSTIN	SHORT LUNCH	MANAGEMENT CHANGE DUE TO COVER	1
2203	TXsCpS	DE LA VEGA, JAVIER	SHORT LUNCH	MANAGEMENT CHANGE DUE TO SALES	4
2203	TeKdH	SARDINETA, DICK	SHORT LUNCH	MANAGEMENT CHANGE DUE TO SALES	1
2203	TeWWec	LEACH, JOE	SHORT LUNCH	MANAGEMENT CHANGE DUE TO SALES	1
2213	TXSEx	STRINGER, CALEB	SHORT LUNCH	MANAGEMENT CHANGE DUE TO SALES	1
2213	TzJ5Tk	KEY, ROBERT	SHORT LUNCH	MANAGEMENT CHANGE DUE TO SALES	1
2214	TeMvK	CRAMER, JOSHUA	SHORT LUNCH	MANAGEMENT CHANGE DUE TO SALES	2
2214	Ted9nn	JAIMES, JODI	SHORT LUNCH	MANAGEMENT CHANGE DUE TO SALES	1
2214	TewNF7	DODGE, JUSTIN	SHORT LUNCH	MANAGEMENT CHANGE DUE TO SALES	2
2216	TZbeVP	HEREDIA, JONATHAN	SHORT LUNCH	MANAGEMENT CHANGE DUE TO SALES	2
2216	TeMTZ4	KEITHLEY, MARION	SHORT LUNCH	MANAGEMENT CHANGE DUE TO SALES	1
2218	TeLidR	WHITTING, JOSHUA	SHORT LUNCH	MANAGEMENT CHANGE DUE TO SALES	3
2216	TewOW	FORSYTHE, JON	SHORT LUNCH	MANAGEMENT CHANGE DUE TO SALES	3
2216	Teqy1	THIERRY, SHELBY	SHORT LUNCH	MANAGEMENT CHANGE DUE TO SALES	2
2217	TYqG1	BENAVIDES, HERIBERTO	SHORT LUNCH	MANAGEMENT CHANGE DUE TO SALES	2
2217	Tx1ck1	MONACO, NICHOLAS	SHORT LUNCH	MANAGEMENT CHANGE DUE TO SALES	1
2218	TMeGZp	BAIRD, JOSHUA	SHORT LUNCH	MANAGEMENT CHANGE DUE TO SALES	6
2219	Tetnoz	JACKMAN, RYAN	SHORT LUNCH	MANAGEMENT CHANGE DUE TO SALES	12
2219	Tebnz8	DUNKROOP, CARISSA	SHORT LUNCH	MANAGEMENT CHANGE DUE TO SALES	11
2219	TeqSE	WEEDMAN, EMILY	SHORT LUNCH	MANAGEMENT CHANGE DUE TO SALES	1
2219	Traggl	BRAUN, JAMES	SHORT LUNCH	MANAGEMENT CHANGE DUE TO SALES	1
2219	TaPlup	GUERRERO, ALFREDO	SHORT LUNCH	MANAGEMENT CHANGE DUE TO SALES	1
2222	TiQJ1	PAGARIGAN, JOHN	SHORT LUNCH	MANAGEMENT CHANGE DUE TO SALES	4
2222	TXGey	STRINGER, CALEB	SHORT LUNCH	MANAGEMENT CHANGE DUE TO SALES	2
2222	TaXVV	AGUILAR, JOE	SHORT LUNCH	MANAGEMENT CHANGE DUE TO SALES	3
2222	Tlapz	STEENBURGH, GLEN	SHORT LUNCH	MANAGEMENT CHANGE DUE TO SALES	5
2222	Tz9BD	ROBERTS, SANDRA	SHORT LUNCH	MANAGEMENT CHANGE DUE TO SALES	6
2223	TeUn91	HICKEY, KAPTAAN	SHORT LUNCH	MANAGEMENT CHANGE DUE TO SALES	2
2223	TevH0d	HARTMAN, NEAL	SHORT LUNCH	MANAGEMENT CHANGE DUE TO SALES	1
2225	TeFIEb	PARGA JR, JUAN	SHORT LUNCH	MANAGEMENT CHANGE DUE TO SALES	1
2225	Teqy01	COLVARD, CHERYL	SHORT LUNCH	MANAGEMENT CHANGE DUE TO SALES	1
2225	TrZSS3	SEMRAD, DANIEL	SHORT LUNCH	MANAGEMENT CHANGE DUE TO SALES	1
2228	TQQKZ5	HOPPER, RYAN	SHORT LUNCH	MANAGEMENT CHANGE DUE TO SALES	6
2228	TiORYm	COLE, CONRAD	SHORT LUNCH	MANAGEMENT CHANGE DUE TO SALES	2
2227	THCCPy	WALKER, ANDREW	SHORT LUNCH	MANAGEMENT CHANGE DUE TO SALES	4
2227	TMAZVg	TEET, JAMES	SHORT LUNCH	MANAGEMENT CHANGE DUE TO SALES	3
2227	TmxiZ	ENG, EDWARD	SHORT LUNCH	MANAGEMENT CHANGE DUE TO SALES	1
2227	TeDzhT	TITARENKO, ALEKSANDR	SHORT LUNCH	MANAGEMENT CHANGE DUE TO SALES	3
2227	TeUWta	MORALES, CARLOS	SHORT LUNCH	MANAGEMENT CHANGE DUE TO SALES	6
2227	TeePoi	TOMPKINS, JASON	SHORT LUNCH	MANAGEMENT CHANGE DUE TO SALES	2
2227	TecoHd	TOTTEN, RYAN	SHORT LUNCH	MANAGEMENT CHANGE DUE TO SALES	6
2227	TzBXOE	VALENZUELA, PALMIRA	SHORT LUNCH	MANAGEMENT CHANGE DUE TO SALES	4
2228	TevMTn	ROSS, FRANK	SHORT LUNCH	MANAGEMENT CHANGE DUE TO SALES	1
2229	TmEQB	EVANS, JASON	SHORT LUNCH	MANAGEMENT CHANGE DUE TO SALES	1
2229	TYFFu1	GONZALEZ, CARLOS	SHORT LUNCH	MANAGEMENT CHANGE DUE TO SALES	4
2229	TYNHD	NARAYAN, RAJ	SHORT LUNCH	MANAGEMENT CHANGE DUE TO SALES	11
2229	TymHgM	BAZANTE, PEDRO	SHORT LUNCH	MANAGEMENT CHANGE DUE TO SALES	6

EXHIBIT L

Page 4 of 6

AZ/MIGIS 0001229

STORE	AT ACTION DESC	AT REASON DESC	num_occurrences
2203	LONG LUNCH	EXCUSED - PERSONAL	1
2203	LONG LUNCH	MANAGEMENT CHANGE DUE TO SALES	1
2203	NO LUNCH	EXCUSED - SICK/ACCIDENT	1
2203	NO LUNCH	EXCUSED - JOB RELATED	2
2203	NO LUNCH	EXCUSED - PERSONAL	1
2203	NO LUNCH	UNEXCUSED - DID NOT FOLLOW SCH	6
2203	NO LUNCH	DEFER	1
2203	NO LUNCH	UNEXCUSED SICK/ACCIDENT	2
2203	NO LUNCH	MANAGEMENT CHANGE DUE TO SALES	13
2203	SHORT LUNCH	MANAGEMENT CHANGE DUE TO SALES	6
2213	LONG LUNCH	EXCUSED - JOB RELATED	3
2213	LONG LUNCH	MANAGEMENT CHANGE DUE TO SALES	1
2213	LONG LUNCH	COVERED FOR ABSENT AUTOZONER	1
2213	NO LUNCH	EXCUSED - SICK/ACCIDENT	1
2213	NO LUNCH	MANAGEMENT CHANGE DUE TO SALES	1
2213	SHORT LUNCH	EXCUSED - JOB RELATED	1
2213	SHORT LUNCH	UNEXCUSED - DID NOT FOLLOW SCH	1
2213	SHORT LUNCH	MANAGEMENT CHANGE DUE TO SALES	2
2214	LONG LUNCH	EXCUSED - JOB RELATED	2
2214	LONG LUNCH	EXCUSED - PERSONAL	1
2214	LONG LUNCH	UNEXCUSED - DID NOT FOLLOW SCH	1
2214	LONG LUNCH	DEFER	1
2214	LONG LUNCH	MANAGEMENT CHANGE DUE TO SALES	6
2214	NO LUNCH	EXCUSED - SICK/ACCIDENT	3
2214	NO LUNCH	EXCUSED - JOB RELATED	2
2214	NO LUNCH	EXCUSED - PERSONAL	1
2214	NO LUNCH	MANAGEMENT CHANGE DUE TO SALES	8
2214	NO LUNCH	COVERED FOR ABSENT AUTOZONER	3
2214	NO LUNCH	AUTOZONER TRADED SHIFT	2
2214	SHORT LUNCH	EXCUSED - JOB RELATED	1
2214	SHORT LUNCH	UNEXCUSED - DID NOT FOLLOW SCH	2
2214	SHORT LUNCH	DEFER	1
2214	SHORT LUNCH	MANAGEMENT CHANGE DUE TO SALES	5
2214	SHORT LUNCH	MANAGEMENT CHANGE DUE TO COVER	4
2216	LONG LUNCH	EXCUSED - JOB RELATED	5
2216	LONG LUNCH	EXCUSED - PERSONAL	1
2216	LONG LUNCH	MANAGEMENT CHANGE DUE TO SALES	4
2216	LONG LUNCH	COVERED FOR ABSENT AUTOZONER	3
2216	LONG LUNCH	AUTOZONER TRADED SHIFT	1
2216	NO LUNCH	EXCUSED - JOB RELATED	20
2216	NO LUNCH	UNEXCUSED - DID NOT FOLLOW SCH	2
2216	NO LUNCH	UNEXCUSED - PERSONAL	1
2216	NO LUNCH	MANAGEMENT CHANGE DUE TO SALES	17
2216	NO LUNCH	MANAGEMENT CHANGE DUE TO COVER	3
2216	NO LUNCH	COVERED FOR ABSENT AUTOZONER	5
2216	NO LUNCH	AUTOZONER TRADED SHIFT	5
2216	SHORT LUNCH	EXCUSED - JOB RELATED	14
2216	SHORT LUNCH	EXCUSED - PERSONAL	2
2216	SHORT LUNCH	DEFER	1
2216	SHORT LUNCH	MANAGEMENT CHANGE DUE TO SALES	11
2216	SHORT LUNCH	MANAGEMENT CHANGE DUE TO COVER	1

EXHIBIT L
Page 5 of 6

AZ/MIGIS 0001231

AT_ACTION_DESC	AT_REASON_DESC	num_occurrences	Percentage by Total of Action Desc
LONG LUNCH	AUTOZONER TRADED SHIFT	2	0.81%
LONG LUNCH	COVERED FOR ABSENT AUTOZONER	10	4.07%
LONG LUNCH	DEFER	4	1.63%
LONG LUNCH	EXCUSED - JOB RELATED	39	15.85%
LONG LUNCH	EXCUSED - PERSONAL	23	9.35%
LONG LUNCH	EXCUSED - SICK/ACCIDENT	1	0.41%
LONG LUNCH	MANAGEMENT CHANGE DUE TO COVER	1	0.41%
LONG LUNCH	MANAGEMENT CHANGE DUE TO SALES	151	61.38%
LONG LUNCH	UNEXCUSED - DID NOT FOLLOW SCH	12	4.88%
LONG LUNCH	UNEXCUSED - FAILURE TO REPORT	2	0.81%
LONG LUNCH	UNEXCUSED - PERSONAL	1	0.41%
NO LUNCH	AUTOZONER TRADED SHIFT	16	4.78%
NO LUNCH	COVERED FOR ABSENT AUTOZONER	12	3.58%
NO LUNCH	DEFER	5	1.49%
NO LUNCH	EXCUSED - JOB RELATED	66	19.70%
NO LUNCH	EXCUSED - PERSONAL	10	2.99%
NO LUNCH	EXCUSED - SICK/ACCIDENT	18	5.37%
NO LUNCH	EXCUSED - SUSPENSION	1	0.30%
NO LUNCH	MANAGEMENT CHANGE DUE TO COVER	7	2.09%
NO LUNCH	MANAGEMENT CHANGE DUE TO SALES	176	52.54%
NO LUNCH	UNEXCUSED - DID NOT FOLLOW SCH	19	5.67%
NO LUNCH	UNEXCUSED - PERSONAL	2	0.60%
NO LUNCH	UNEXCUSED SICK/ACCIDENT	3	0.90%
SHORT LUNCH	AUTOZONER TRADED SHIFT	7	2.10%
SHORT LUNCH	COVERED FOR ABSENT AUTOZONER	11	3.29%
SHORT LUNCH	DEFER	4	1.20%
SHORT LUNCH	EXCUSED - JOB RELATED	69	20.66%
SHORT LUNCH	EXCUSED - PERSONAL	2	0.60%
SHORT LUNCH	EXCUSED - SUSPENSION	1	0.30%
SHORT LUNCH	MANAGEMENT CHANGE DUE TO COVER	12	3.59%
SHORT LUNCH	MANAGEMENT CHANGE DUE TO SALES	214	64.07%
SHORT LUNCH	UNEXCUSED - DID NOT FOLLOW SCH	14	4.19%

EXHIBIT L
Page 60 of 6

AZ/MIGIS 0001235

JUN 25 2008 02:56 PM LITTLER MENDELSON P.C. (206) 447-6965

2/3

LITTLER MENDELSON*
A NATIONAL CORPORATION

June 25, 2008

Leigh Ann Tift
Direct: 206.381.4905
Direct Fax: 206.447.6965
litt@littler.com

VIA EMAIL AND REGULAR MAIL

Chey Powelson
Bailey Pinney & Associates LLC
1498 SE Tech Center Place, Suite 290
Vancouver, WA 98683

Re: *Migis v. AutoZone, Inc.*
Multnomah County Circuit Court Case No. 0711-13531

Dear Mr. Powelson:

I received your notice of deposition for Mike Italiano. Unfortunately, we are unable to produce Mr. Italiano, as he is no longer employed by AutoZone. In any event, I'm not available either July 1 or July 2. If you plan to reschedule and subpoena Mr. Italiano, who I understand is working for NAPA, please give me more than one week's notice, as I do need to plan the trip to Portland.

I was also copied on the emails about the lunch variance reports. The documents you mention, Bates labeled 1220-1235, are a subset of the information we sent in excel format. I think even a cursory look at the spreadsheet that corresponds to Bates 1253-1288 would show you that it is just a more comprehensive compilation of short/long lunch period data for Oregon employees. If you can explain one thing that is missing from the 1253-1288 spreadsheet, i.e., one substantive bit of information that you might find on 1220-1235, other than differently labeled columns or summaries of information (listing each occasion an employee took a long lunch rather than the total number of times), I could understand your demand for supplementation. It's obvious to me, though, that you have an electronic copy of the most comprehensive spreadsheet, that there is no missing information, and that the demand for more excel spreadsheets is nothing more than pointless insistence on having the same information in a variety of formats. I think that discovery should be directed to a more meaningful result.

The same is true of the weekly summary hours reports. You have every employee's time records for the entire time period you requested. I do not understand why you are bringing a motion to compel a document summarizing information that has already been provided to you—at considerable time and expense and in electronic format, I might add. If I'm missing something, let me know and we can discuss this request.

THE NATIONAL EMPLOYMENT & LABOR LAW FIRM*

600 University Street, Suite 3000, Seattle, Washington 98101-3122 Tel: 206.447.3300 Fax: 206.447.6965 www.littler.com

EXHIBIT M

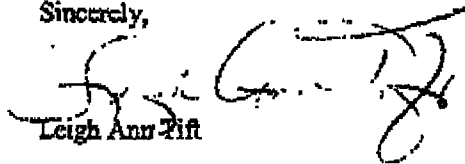
Page 1 of 2

Jun-25-2008 02:56 PM LITTLER MENDELSON P.C. (206) 447-6965

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Chey Powelson
June 25, 2008
Page 2

Sincerely,



Leigh Ann Tift

cc: Tanya Holmes
Amy Alpcrn

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EXHIBIT M
Page 2 of 2

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**IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH**

MICHAEL MIGIS, individually and on behalf
of all others similarly situated,

Plaintiff,

v.

AUTOZONE, INC., a Foreign Corporation,

Defendant.

No. 0711-13531

**SUPPLEMENTAL
MEMORANDUM RE EFFECT OF
GAFUR AND JOARNT**

The Court of Appeals recently declined to decide the “meal period” question posed under ORS 19.225. *Joarnt v. AutoZone*, A131776, Order Partially Vacating Order to Show Cause, Denying Application for Interlocutory Appeal, and Order of Dismissal (Appeal dismissed June 25, 2008) The Court vacated its order and dismissed the appeal “on the ground that the case no longer presents questions of law as to which there is substantial grounds for difference of opinion.” The Court believed that *Gafur v. Legacy Good Samaritan Hospital*, 344 Or 525 (2008), “resolved the questions of law certified by the trial court.” Order, p. 2. Unfortunately, the Court did not explain how it thought *Gafur* resolved the meal period issue. Needless to say, the parties have opposite points of view.

Plaintiff understands *Gafur* to hold that an employee may sue his or her employer for unpaid wages and, in the case of missed rest breaks, there are no unpaid wages due if the employer paid for the entire work period. Defendant misses this point and tells the Court that Plaintiff concedes that “he has no private right of action for his rest period claim * * *.” Defendant’s Reply, p. 1. This is untrue. Plaintiff makes no such concession, and *Gafur* does

1 not hold that Plaintiff does not have a “private right of action.” On the contrary, *Gafur* does
 2 not question whether an employee can bring a private lawsuit for unpaid wages. *Gafur*
 3 addresses whether wages are due when an employer pays for “work time,” but the employee
 4 does not get a rest break during that time. Under *Gafur*, an employee who misses a break but
 5 is paid for the entire work period is not “missing” any wages. But the same is not true for
 6 meal periods. *Gafur* permits an employee to sue for missing wages, including those due to
 7 truncated meal breaks.¹

8 Neither does *Gafur* stand for the proposition that the Court must ignore all rules issued
 9 by the Bureau of Labor and Industries (BOLI) in determining whether an employee is owed
 10 wages. On the contrary, *Gafur* recognizes the authority of the Bureau to promulgate rules,
 11 including those that require payment of wages. What Defendant wants *Gafur* to say is that the
 12 employer need only pay for minutes that are actually worked – that is, physical labor.
 13 Unfortunately for Defendant, *Gafur* rules to the contrary.

14 *Gafur* recognizes that “the fact that an employer may not deduct wages from the
 15 employee’s pay for the rest break also supports the idea that employees are working during
 16 rest periods, even if they are **not performing duties at that time.**” (Emphasis supplied.) 344
 17 Or at 534. The Court explains that other BOLI regulations establish that employees are not
 18 required to be working “(in the colloquial sense) the entire time that they are considered to be
 19 ‘working’ for purposes of wage and hour laws.” *Id.* The Court then contrasts rules that
 20 explicitly require payment of wages with the rest period requirement that does “not suggest an
 21 intention that [BOLI] requires employers to pay additional wages if the rule[s] are violated.”
 22 344 Or at 536, note 8 (OAR 839-020-0030 specifically provides that overtime wages must be

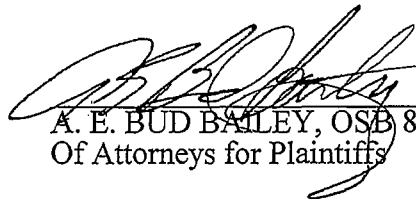
23
 24 ¹Defendant wants to rely on the meal period claim alleged in *Gafur*. The claims are
 25 different. In *Gafur*, the Court of Appeals found that the pleading did not allege any unpaid
 26 wages. Here, Defendant does not pay employees for meal periods during which the employee
 performed work, and Plaintiff alleged that Defendant failed to pay wages due because Defendant
 deducted time for meal periods of less than 30 minutes and those wages remain due and
 outstanding.

1 paid).

2 Former OAR 839-020-0050 (2) (b) requires the employer to pay the employee wages
3 for the entire meal period if the employee does not receive one half hour of interrupted time:
4 "A period in which to eat food * * * while continuing to perform duties or remain on call,
5 **which is not deducted from the employee's hours worked.**"² This rule is an explicit
6 requirement to pay just wages as the overtime rule specifically requires payment of wages.
7 The meal period rule is like the overtime rule in this regard.

8 Finally, the *Gafur* court did not give credence to BOLI's support of the Court of
9 Appeals' decision regarding rest period violations because it held that BOLI had not
10 previously interpreted the rest period provision to require additional wages and had not
11 previously enforced it that way. But BOLI has a long history of interpreting the meal period
12 provision to require employers to pay wages to employees who do not receive a full 30-
13 minute meal period uninterrupted by work. See cases and authorities cited in Plaintiff's
14 Response to Defendant's Motion for Partial Summary Judgment on the Pleadings, p. 3.

15
16 DATED July 8, 2008.

17
18 
19 A. E. BUD BAILEY, OSB 871577
20 Of Attorneys for Plaintiffs
21
22

23 ²Former OAR 839-020-0050 (2) (a) defines a meal period to require 30 minutes of
24 uninterrupted time. Subsection B discusses a meal period that requires the employee to work
25 during some portion of it or to remain on call. In that case the meal period must be paid.
26 Recently, the Bureau revised this rule, and the new language makes it even more clear that the
Bureau insists that employers pay for the entire 30 minute period if any portion of it is worked.
OAR 839-020-00050 (6) (g) states "the employee is paid for any and all meal periods in which
the employee is not completely relieved of all duty."

CERTIFICATE OF SERVICE

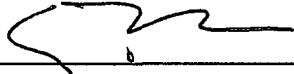
I hereby certify that I caused to be served the foregoing **Supplemental Memorandum Re Effect of *Gafur and Joarnt*** upon:

Amy Alpern
Littler Mendelson
1750 SW Harbor Way, Suite 450
Portland, OR 97201

by the following indicated method or methods:

☒ by causing a full, true, and correct copy thereof to be **hand-delivered** to the person listed above on the date set forth below.

DATED: July 8, 2008



CHEY POWELSON, OSB 035512
Of Attorneys for Plaintiffs

COPY

IN THE COURT OF APPEALS OF THE STATE OF OREGON

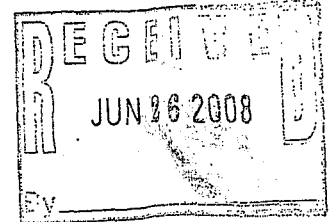
RICHARD JOARNT and BERT YAMAOKO, individually and on behalf of all
others similarly situated,
Plaintiffs-Appellants,

v.

AUTOZONE, INC., a foreign corporation,
Defendant-Respondent.

Multnomah County Circuit Court
050302795

A131776



**ORDER PARTIALLY VACATING ORDER TO SHOW CAUSE, DENYING
APPLICATION FOR INTERLOCUTORY APPEAL, AND
ORDER OF DISMISSAL**

Before Wollheim, P. J., and Schuman and Rosenblum, JJ.

This matter is before us on remand from the Supreme Court. *Joarnt v. Autozone, Inc.*, 343 Or 187, 166 P3d 525 (2007).

Appellants have applied pursuant to ORS 19.225 for leave to proceed with an interlocutory appeal of the trial court's order granting partial summary judgment in an action that appellants may seek to have certified as a class action. The trial judge has certified certain questions for review on appeal.

By order dated April 9, 2008, the court directed the appeal to proceed, but also directed appellants to show cause why the trial court's decision should not be summarily reversed and remanded for further proceedings in light of this court's decision in *Garfur v. Legacy Good Samaritan Hospital*, 213 Or App 343, 161 P3d 319 (2007), *rev allowed*, 343 Or 467 (2007).

Thereafter, the Supreme Court decided *Garfur v. Legacy Good Samaritan Hospital*, 344 Or 525, ___ P3d ___ (2008), and resolved the questions of law certified by the trial court.

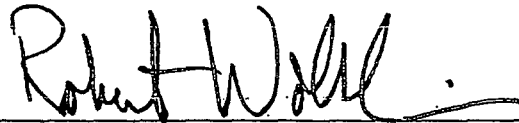
Therefore, the court vacates the part of the April 9, 2008, order granting the application and directing the appeal to proceed. Further, the court denies the application for

leave to proceed and dismisses the appeal on the ground that the case no longer presents questions of law as to which there is substantial ground for difference of opinion, as required by ORS 19.225.

Appeal dismissed.

JUN 25 2008

Date



Robert Wollheim, Presiding Judge

c: James C. Webber
Jacqueline L. Koch
Douglas S. Parker
David A. Schuck
James Dana Pinney

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

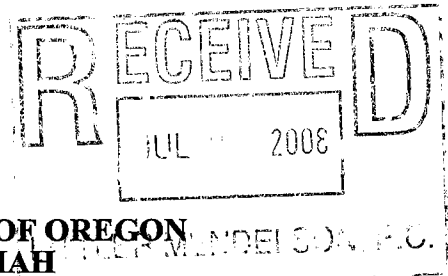
Prevailing party: Respondent

☒ No costs allowed

☐ Costs allowed, payable by:

REPLIES SHOULD BE DIRECTED TO THE STATE COURT ADMINISTRATOR, RECORDS
SECTION, SUPREME COURT BUILDING, 1163 STATE STREET, SALEM, OR 97301-2563

061008ca.wpd,p2,odsc



**IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH**

MICHAEL MIGIS, individually, and on
behalf of all other persons similarly situated,

Plaintiff,

v.

AUTOZONE, INC.,

Defendant.

Case No. **0711-13531**

**PLAINTIFF'S MOTION FOR
COORDINATION WITH JOARNT
v. AUTOZONE, INC.** (Mult. Co.
Case No. 0503-02795)

I. MOTION

PLAINTIFF through his attorneys herein, move this Court under ORCP 32 for an order requesting coordination of this cause of action with *Joarnt, et al. v. AutoZone, Inc.*, Multnomah Co. Case No. 0503-02795. In the alternative, Plaintiffs request consolidation with the *Joarnt* case, pursuant to ORCP 53A.

Plaintiff's counsel has conferred with Defendant's counsel regarding this issue, and Defendant's counsel responded, "I have explained why the procedural postures of those cases may make that possible. That remains to be seen." See attached letter (underline original).

II. BACKGROUND

On November 16 2007, Michael Migis filed this case as a putative class action against AutoZone, alleging various wage and hour violations in the State of Oregon.

On March 17, 2005, Plaintiffs Richard Joarnt and Bert Yamaoka filed *Joarnt v. AutoZone, Inc.*, alleging a class action and various wage and hour violations by AutoZone in the

1 State of Oregon. In early 2006, the Honorable Henry Kantor ordered *Joarnt* stayed at the trial
 2 court level, pending resolution of certain issues on appeal pursuant to ORS 19.225. On June 25,
 3 2008 the Court of Appeals issued an order dismissing the *Joarnt* case from appeal. See attached
 4 Order.

5 III. ARGUMENT & AUTHORITIES

6 Even prior to a court order expressly certifying a class action, the provisions of ORCP 32
 7 “indicate that the entire proceeding *is* a class action[.]” *Joarnt v. AutoZone, Inc.*, 343 Or 187, 192
 8 (2007) (*italics original*). Oregon Revised Statute 1.004 states:

9 Notwithstanding any other provision of law or the Oregon Rules of
 10 Civil Procedure, the Supreme Court shall provide by rule the practice
 11 and procedure for coordination of class actions under ORCP 32 in
 12 convenient courts, including provision for giving notice and presenting
 evidence.

13 Oregon Rule of Civil Procedure 32 provides, in part:

14 When class actions sharing a common question of fact or law are
 15 pending in different courts, the presiding judge of any such court, upon
 16 motion of any party or on the court’s own initiative, may request the
 17 Supreme Court to assign a Circuit Court, Court of Appeals, or Supreme
 18 Court judge to determine whether coordination of the actions is
 appropriate, and a judge shall be so assigned to make that
 determination.

19 ORCP 32L(1)(a). See also ORCP 32L(1)(b) - (3). Cf. ORCP 53A.

20 There are common questions of law or fact between these two cases, and the parties in
 21 both actions are represented by the same attorneys. The cases should therefore be coordinated
 22 to assist in avoiding unnecessary costs and delay by the parties, their attorneys, and the courts.

23
 24 ///

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26 ///

1
2 **III. CONCLUSION**

3 For all the reasons set forth herein, the Court should request or otherwise grant
4 coordination of this cause of action with *Joarnt v. AutoZone, Inc.*, or consolidate this case with
5 *Joarnt*.

6
7
8 DATED this 18th day of JULY 2008.

BAILEY, PINNEY & ASSOCIATES, LLC

9
10 
11 A.E. "BUD" BAILEY, OSB 871577
12 Attorneys for Plaintiffs
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CERTIFICATE OF SERVICE

I hereby certify that I caused to be served the foregoing Plaintiffs' MOTION FOR COORDINATION upon:

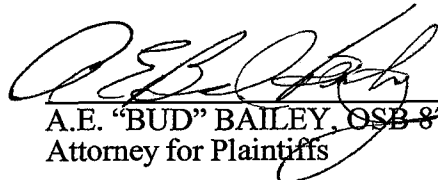
Leigh Ann Tift
Littler Mendelson
One Union Square
600 University St, Ste 3200
Seattle WA 98101-3122
Fax: (206) 447-6965
Attorney for Defendant AutoZone

by the following indicated method or methods **on the date set forth below:**

- ☒ by facsimile transmission to the above-listed fax number.
- ☒ by causing a full, true, and correct copy thereof to be **deposited in the U.S. mail service.**

DATED July 18, 2008

BAILEY, PINNEY & ASSOCIATES, LLC


A.E. "BUD" BAILEY, OSB 871577
Attorney for Plaintiffs



ALABAMA

ARIZONA

ARKANSAS

CALIFORNIA

July 15, 2008

Leigh Ann Tift

Direct: 206.381.4905

Direct Fax: 206.447.6965

ltift@littler.com

COLORADO

CONNECTICUT

VIA EMAIL AND REGULAR MAIL

DISTRICT OF COLUMBIA

Mr. A.E. Bud Bailey
 Bailey Pinney & Associates LLC
 1498 SE Tech Center Place, Suite 290
 Vancouver, WA 98683

FLORIDA

GEORGIA

ILLINOIS

Re: *Migis v. AutoZone, Inc.*
 Multnomah County Circuit Court Case No. 0711-13531

INDIANA

Dear Mr. Bailey:

MASSACHUSETTS

Following our telephone conference yesterday, and as you requested, I reviewed the lunch variance reports that AutoZone was to provide. I believe you have all lunch variance reports for the year 2005, as they were produced in the AutoZone/Joarnt matter. If you are unable to locate them or believe those records are not sufficient, please let me know.

MINNESOTA

MISSOURI

You also asked that I check the status of our production of the payroll tax reports. I'm told that the 2007 reports are on their way. Assuming they arrive tomorrow, I will have them sent out to you tomorrow, and if not, as soon as they arrive. However, AutoZone does not have a copy of the 2006 report because, apparently, the software provided by the State of Oregon does not allow AutoZone to re-open a report that has been filed with the state. I believe that you can request a copy of that report from the State, or AutoZone will request a copy on Plaintiff's behalf.

NEVADA

NEW JERSEY

NEW YORK

NORTH CAROLINA

You also asked if I would stipulate that the lunch variance reports, which you referenced as AZ 1253-1288, were business records. I will stipulate that these records are authentic, as I've previously stated to Mr. Powelson. Beyond that, I do not wish to stipulate to a legal characterization.

OHIO

OREGON

PENNSYLVANIA

You asked, again, what our position is on the weekly summarization of hours reports. I believe this is a subject in one of the many motions to compel you've filed, and I do not think it is appropriate, cost effective, or in my client's interest to continually revisit issues that have been brought to the Court's attention and heard.

RHODE ISLAND

SOUTH CAROLINA

I understand you wish to consolidate the Joarnt and Migis matters, and I have explained why the procedural postures of those cases may make that impossible. That remains to be seen.

TEXAS

VIRGINIA

WASHINGTON

Chey Powelson
July 15, 2008
Page 2

Finally, I am checking with Mr. Dessem regarding his availability for a deposition in Memphis.

Sincerely,



Leigh Ann Tift

cc: Tanya Holmes
Amy Alpern

Firmwide:85919850.1 013306.2124

COPY

IN THE COURT OF APPEALS OF THE STATE OF OREGON

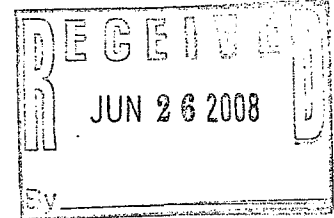
RICHARD JOARNT and BERT YAMAOKO, individually and on behalf of all
others similarly situated,
Plaintiffs-Appellants,

v.

AUTOZONE, INC., a foreign corporation,
Defendant-Respondent.

Multnomah County Circuit Court
050302795

A131776



**ORDER PARTIALLY VACATING ORDER TO SHOW CAUSE, DENYING
APPLICATION FOR INTERLOCUTORY APPEAL, AND
ORDER OF DISMISSAL**

Before Wollheim, P. J., and Schuman and Rosenblum, JJ.

This matter is before us on remand from the Supreme Court. *Joarnt v. Autozone, Inc.*, 343 Or 187, 166 P3d 525 (2007).

Appellants have applied pursuant to ORS 19.225 for leave to proceed with an interlocutory appeal of the trial court's order granting partial summary judgment in an action that appellants may seek to have certified as a class action. The trial judge has certified certain questions for review on appeal.

By order dated April 9, 2008, the court directed the appeal to proceed, but also directed appellants to show cause why the trial court's decision should not be summarily reversed and remanded for further proceedings in light of this court's decision in *Garfur v. Legacy Good Samaritan Hospital*, 213 Or App 343, 161 P3d 319 (2007), *rev allowed*, 343 Or 467 (2007).

Thereafter, the Supreme Court decided *Garfur v. Legacy Good Samaritan Hospital*, 344 Or 525, ___ P3d ___ (2008), and resolved the questions of law certified by the trial court.

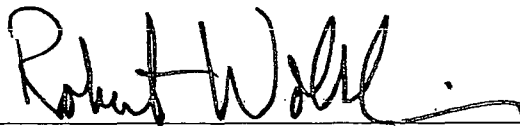
Therefore, the court vacates the part of the April 9, 2008, order granting the application and directing the appeal to proceed. Further, the court denies the application for

leave to proceed and dismisses the appeal on the ground that the case no longer presents questions of law as to which there is substantial ground for difference of opinion, as required by ORS 19.225.

Appeal dismissed.

JUN 25 2008

Date



Robert Wollheim, Presiding Judge

c: James C. Webber
Jacqueline L. Koch
Douglas S. Parker
David A. Schuck
James Dana Pinney

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Respondent

☒ No costs allowed

☐ Costs allowed, payable by:

REPLIES SHOULD BE DIRECTED TO THE STATE COURT ADMINISTRATOR, RECORDS
SECTION, SUPREME COURT BUILDING, 1163 STATE STREET, SALEM, OR 97301-2563

061008ca.wpd,p2,odsc

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

MICHAEL MIGIS, individually, and on
behalf of all other persons similarly
situated,,

Plaintiff,

vs.

AUTOZONE INC., a Nevada
Corporation,,

Defendant.

No. 0711-13531

**DEFENDANT'S RESPONSE TO
PLAINTIFF'S MOTION FOR
COORDINATION WITH JOARNT V.
AUTOZONE (CASE NO. 0503-02795)**

I. INTRODUCTION

Plaintiff asks that this Court coordinate this cause of action with *Joarnt et al. v. AutoZone*, Case No. 0503-02795, or in the alternative consolidate the cases. Defendant, AutoZone, Inc., maintains that this Motion is premature, for the reasons set forth below. Further, not even four months ago, Plaintiff's counsel vigorously opposed this very relief, and AutoZone asks that the Court address the tactics that Plaintiff has employed in this case to increase costs and prolong the litigation.

II. LEGAL STANDARD

The Oregon Rules of Civil Procedure provide that a "Coordination of class actions sharing a common question of fact or law is appropriate if one judge hearing all of the actions for all purposes ...will promote the ends of justice..., the convenience of the parties..., the relative development of the actions...[and] the disadvantages of duplicative and inconsistent rulings...". As with a class action in the federal courts, the court must "look to the claims Plaintiffs seek to litigate in the factual context

1 of the case and determine whether the Plaintiffs' claims lend themselves to common proof.” *In re*
 2 *NCAA I-A Walk-On Football Players Litigation*, 2006 WL 1207915, at *9 (W.D. Wash. 2006).

3 Likewise, the rules permit consolidation when “more than one action involving a common
 4 question of law or fact is pending before the court [so as to] avoid unnecessary costs or delay.”
 5 ORCP 53A. In *Atkeson v. Cupp*, 68 Or. App. 196 (1984), the Court of Appeals analyzed the
 6 propriety of consolidating 63 habeas corpus petitions into three petitions. The Court of Appeals
 7 upheld consolidation because “[t]he 63 petitions were identical, the same attorney was appointed to
 8 represent all the prisoners and the issues and necessary discovery would be the same or nearly the
 9 same in each case.” *Id.* at 198. The Court of Appeals further noted the absence of any prejudice to
 10 the prisoners for the consolidation and, in fact, commented that “we are unable to conceive of any
 11 possible prejudice, at least at this point in the proceedings.” *Id.*

12 **III. RELEVANT FACTS**

13 The current posture of these cases does not lend itself to coordination or to consolidation.
 14 That is so because, in *Joarnt*, Judge Kantor dismissed the Plaintiffs’ rest and meal break claims as a
 15 matter of law. *See*, Exhibit 1. In *Migis*, the same questions were presented to Judge LaBarre, but he
 16 has yet to rule on AutoZone’s motion. *See*, Excerpt of July 11, 2008 transcript, attached as Exhibit
 17 2; Motion for Judgment as a Matter of Law, attached as Exhibit 3.

18 **IV. ARGUMENT**

19 Should Judge LaBarre enter a decision different from that of Judge Kantor, it would be
 20 virtually impossible to try these cases as one. As just one example, it would be impossible to
 21 cogently instruct the jury that some AutoZone employees encompassed in the *Joarnt* class (assuming
 22 it is certified) do not have any right to recover for meal breaks, but some employees included in the
 23 *Migis* class,¹ subject to the same work practices and employed by the very same employer, might.

24
 25
 26 ¹ Again, assuming that a class is certified.


1 To complicate this question further, even Plaintiff's counsel concedes that there is "overlap"
 2 between the members of the putative class in *Joarnt* and the putative class in *Migis*.

3 Also, these two lawsuits are in different stages of litigation. At the time Judge Kantor
 4 entered his order dismissing Plaintiffs' meal and rest breaks, AutoZone had a motion to deny class
 5 certification pending. *See*, Excerpt of Motion and Praeipce, attached as Exhibit 4. One of the most
 6 significant issues included in that motion was Mr. Yamaoka's (a named Plaintiff) unsuitability as a
 7 class representative. Plaintiff has yet to file a motion in *Migis* seeking class certification, and the
 8 risk of inconsistent results—at least at this point in the litigation—cannot be overlooked.

9 V. CONCLUSION

10 AutoZone asks that this Court deny Plaintiff's motion. There are motions pending before
 11 both Judge LaBarre and Judge Kantor that make consolidation inappropriate at this time.

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 16 Dated: July 23, 2008

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 18 

19 Leigh Ann Collings Tift OSB No.05473
 LITTLER MENDELSON
 A Professional Corporation

20 Attorneys for Defendant
 21 Autozone Inc.

CERTIFICATE OF SERVICE

I hereby certify that on July 23, 2008, I served a full, true, and correct copy of the foregoing:

**DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION FOR COORDINATION
WITH JOARNT V. AUTOZONE (CASE NO. 0503-02795)**


- ☐ By delivery via messenger, or otherwise by hand,
☒ By facsimile,
☐ By e-mail,
☒ By mailing same, postage paid

addressed to:

Bailey Pinney & Associates LLC
Attorneys at Law
1498 SE Tech Center Place
Suite 290
Vancouver, WA 98683
Fax (360) 567-3331

Of Attorneys for Plaintiff

By



Savanna L. Stevens

Firmwide:85969697.1 013306.2124

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

MICHAEL MIGIS, individually, and on
behalf of all other persons similarly
situated,,

Plaintiff,

vs.

AUTOZONE INC., a Nevada
Corporation,,

Defendant.

No. 0711-13531

**DEFENDANT'S REVISED RESPONSE TO
PLAINTIFF'S MOTION FOR
COORDINATION WITH JOARNT V.
AUTOZONE (CASE NO. 0503-02795)**

I. INTRODUCTION

Plaintiff asks that this Court coordinate this cause of action with *Joarnt et al. v. AutoZone*, Case No. 0503-02795, or in the alternative consolidate the cases. Defendant, AutoZone, Inc., maintains that this Motion is premature, for the reasons set forth below. Further, not even four months ago, Plaintiff's counsel vigorously opposed this very relief, and AutoZone asks that the Court address the tactics that Plaintiff has employed in this case to increase costs and prolong the litigation.

II. LEGAL STANDARD

The Oregon Rules of Civil Procedure provide that a "Coordination of class actions sharing a common question of fact or law is appropriate if one judge hearing all of the actions for all purposes ...will promote the ends of justice..., the convenience of the parties..., the relative development of the actions...[and] the disadvantages of duplicative and inconsistent rulings...". As with a class action in the federal courts, the court must "look to the claims Plaintiffs seek to litigate in the factual context

1 of the case and determine whether the Plaintiffs' claims lend themselves to common proof.” *In re*
 2 *NCAA I-A Walk-On Football Players Litigation*, 2006 WL 1207915, at *9 (W.D. Wash. 2006).

3 Likewise, the rules permit consolidation when “more than one action involving a common
 4 question of law or fact is pending before the court [so as to] avoid unnecessary costs or delay.”
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 10 the prisoners for the consolidation and, in fact, commented that “we are unable to conceive of any
 11 possible prejudice, at least at this point in the proceedings.” *Id.*

12 **III. RELEVANT FACTS**

13 The current posture of these cases does not lend itself to coordination or to consolidation.
 14 That is so because, in *Joarnt*, Judge Kantor dismissed the Plaintiffs’ rest and meal break claims as a
 15 matter of law. *See*, Exhibit 1. In *Migis*, the same questions were presented to Judge LaBarre, but he
 16 has yet to rule on AutoZone’s motion. *See*, Excerpt of July 11, 2008 transcript, attached as Exhibit
 17 2; Motion for Judgment as a Matter of Law, attached as Exhibit 3.

18 **IV. ARGUMENT**

19 Should Judge LaBarre enter a decision different from that of Judge Kantor, it would be
 20 virtually impossible to try these cases as one. As just one example, it would be impossible to
 21 cogently instruct the jury that some AutoZone employees encompassed in the *Joarnt* class (assuming
 22 it is certified) do not have any right to recover for meal breaks, but some employees included in the
 23 *Migis* class,¹ subject to the same work practices and employed by the very same employer, might.

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 25
 26 ¹ Again, assuming that a class is certified.

1 To complicate this question further, even Plaintiff's counsel concedes that there is "overlap"
2 between the members of the putative class in *Joarnt* and the putative class in *Migis*.

3 Also, these two lawsuits are in different stages of litigation. At the time Judge Kantor
4 entered his order dismissing Plaintiffs' meal and rest breaks, AutoZone had a motion to deny class
5 certification pending. *See*, Excerpt of Motion and Praecept, attached as Exhibit 4. One of the most
6 significant issues included in that motion was Mr. Yamaoka's (a named Plaintiff) unsuitability as a
7 class representative. Plaintiff has yet to file a motion in *Migis* seeking class certification, and the
8 risk of inconsistent results—at least at this point in the litigation—cannot be overlooked.

9 **V. CONCLUSION**

10 AutoZone asks that this Court deny Plaintiff's motion. There are motions pending before
11 both Judge LaBarre and Judge Kantor that make consolidation inappropriate at this time.

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16 Dated: July 24, 2008

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18 
19 Leigh Ann Collings Tift OSB No.05473

LITTLER MENDELSON
A Professional Corporation

20 Attorneys for Defendant
21 Autozone Inc.
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CERTIFICATE OF SERVICE

I hereby certify that on July 24, 2008, I served a full, true, and correct copy of the foregoing:

**DEFENDANT'S REVISED RESPONSE TO PLAINTIFF'S MOTION FOR
COORDINATION WITH JOARNT V. AUTOZONE (CASE NO. 0503-02795)**

- ☐ By delivery via messenger, or otherwise by hand,
☒ By facsimile,
☐ By e-mail,
☒ By mailing same, postage paid

addressed to:

Bailey Pinney & Associates LLC
Attorneys at Law
1498 SE Tech Center Place
Suite 290
Vancouver, WA 98683
Fax (360) 567-3331

Of Attorneys for Plaintiff

By


Savanna L. Stevens

Firmwide:85969697.1 013306.2124

EXHIBIT 1

FILED

06 FEB 13 AM 9:52

CIRCUIT COURT
FOR MULTNOMAH COUNTY

ENTERED

FEB 15 2006

REGISTER BY EG

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

RICHARD JOANT and BERT YAMAOKO,
individually and on behalf of all others
similarly situated,

Plaintiffs,

vs.

AUTOZONE, INC., a foreign corporation,

Defendant.

No. 0503-02795

**PROPOSED ORDER ON
PLAINTIFFS' MOTIONS TO
AMEND, STRIKE, AND COMPEL,
AND DEFENDANT'S MOTION FOR
JUDGMENT ON THE PLEADINGS**

This matter having come before the Court upon Plaintiffs' Motion for Leave to File an Amended Complaint (Wage Claim) (ORCP 23A), Plaintiffs' Motions to Strike a portion of Defendant's Motion for Judgment on the Pleadings and Motion to Strike the Declaration of Laura Liebman-Alperson, Plaintiffs' Motion to Compel Discovery (ORCP 46), and Defendant's Motion for Judgment on the Pleadings. Oral argument regarding these motions was conducted on December 15, 2005. Plaintiffs were represented by A. E. Bailey, J. Dana Pinney, Chey K. Powelson, and Shauna M. Sjostrom. Defendant was represented by Laura Liebman-Alperson and Leigh Ann Collings Tift. The Court, being fully advised of the premise thereof, **HEREBY ORDERS THAT:**

1. Plaintiffs' Motion for Leave to File an Amended Complaint to add a claim for failure to pay minimum wage to certain employees whose wage rate was at or near minimum wage is **GRANTED, without any prejudice to any motion to dismiss that may be brought.**

* * * *

2. Plaintiffs' Motion to Strike evidence included in Defendant's Motion for Judgment on the Pleadings, to wit, footnote 5, page 7 of Defendant's Motion, is

GRANTED.

3. Plaintiffs' Motion to Strike the Declaration of Laura Liebman-Alperson in Support of the Motion for Judgment on the Pleadings and in Opposition to Plaintiffs' First Motion to Strike is **DENIED.**

4. Plaintiffs' Motion to Compel Discovery (ORCP 46) is **GRANTED** in part, and **DENIED** in part:

4.a. Plaintiffs' Motion to Compel AutoZone to produce electronic time records for Oregon employees, dating back one year from the filing of the Complaint (RFP No. 11, Plaintiffs' Third Requests for Production), in the same form as is depicted on Exhibit N to Plaintiffs' Motion to Compel is **GRANTED**, provided, however, the Court may, at a later point and for good cause, shift the costs of producing these records to Plaintiffs. The Court does not impose a specific date by which these records must be provided to Plaintiffs, but does order that the records be produced quickly and without delay. The Court further enters a Protective Order in regard to the time records, limiting disclosure of employee time records, including any personal information, strictly for the purpose of the prosecution or defense of this proceeding, and requiring that the parties not publish such information to people not connected with this lawsuit without prior permission of the Court and, if filing any such information, must do so under seal unless otherwise ordered by the Court;

4.b. Plaintiffs' Motion to Compel AutoZone to produce "Daily Merchandise and/or Parts Delivery and Pick-up Schedules," (RFP No. 9, Plaintiffs' Third Requests for Production), is **DENIED**;

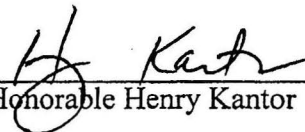
* * * *

1 4.c. Plaintiffs' Motion to Compel AutoZone to produce additional
2 documents "Evidencing Defendant's Efforts to Ascertain the Requirements of ORS 652.140
3 Prior to the Filing of the Complaint," (RFP No. 1, Plaintiffs' Third Requests for Production),
4 is **DENIED**; and

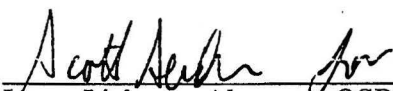
5 4.d. Plaintiffs' Motion to Compel AutoZone to Produce "Termination
6 Reports," (RFP No. 24, Plaintiffs' First Requests for Production), is **DENIED**, without
7 prejudice to refile should Plaintiffs' motion for class certification be granted and Plaintiffs
8 establish a demonstrable need.

9 5. Defendant's Motion for Judgment on the Pleadings is **GRANTED** in
10 its entirety.

11 DATED this 10th day of February 2006.

12
13
14 
The Honorable Henry Kantor

15
16 Presented by:

17 
18 Laura Liebman-Alperson, OSB No. 02367
19 Of Attorneys for Defendant
20
21
22
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26

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **PROPOSED ORDER ON PLAINTIFFS' MOTIONS TO AMEND, STRIKE, AND COMPEL, AND DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS** on:

A. E. Bailey
David A. Schuck
Shauna Marie Sjostrom
Bailey Pinney & Associates LLC
1498 SE Tech Center Place, Suite 290
Vancouver, WA 98683
Attorneys for Plaintiffs

☒ by mailing a copy thereof in a sealed, first-class postage prepaid envelope, addressed to each attorney's last-known address and depositing in the U.S. mail at Portland, Oregon on the date set forth below;

☐ by causing a copy thereof to be hand-delivered to said attorneys at each attorney's last-known office address on the date set forth below;

☐ by sending a copy thereof via overnight courier in a sealed, prepaid envelope, addressed to each attorney's last-known address on the date set forth below; or

☒ by faxing a copy thereof to each attorney at his last-known facsimile number on the date set forth below.

DATED: February 10, 2006.

By: 

Scott G. Seidman, OSB No. 83320
Laura Liebman-Alperson, OSB No. 02367
Attorneys for Defendant

032895\00001\667320 V004

CERTIFICATE OF SERVICE

Tonkon Torp LLP
888 SW Fifth Avenue, Suite 1600
Portland, Oregon 97204
503-221-1440

EXHIBIT 2

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

MICHAEL MIGIS, individually,)	
and on behalf of all others)	
similarly situated,)	
Plaintiff,)	
vs.)	Case No. 0711-13531
AUTOZONE INC., A Nevada)	
corporation,,)	
Defendants.)	

BE IT REMEMBERED THAT on the 11th day of
July, 2008, the above-entitled matter came on for
hearing before the HONORABLE JEROME LaBARRE, Circuit
Court Judge.

DEBORAH L. COOK, RPR, CSR
COOK COURT REPORTING, INC.
1102 N. Springbrook Road
Suite 136
Newberg, Oregon 97132
(503) 537-0339
deb@cookcourtreporting.com

1 the other matters directly. And all future hearings in
2 the case, I want each of those counsel to be here in
3 Court and make the presentations.

4 I am hoping that by reducing the number of
5 individuals who are communicating back and forth,
6 matters can be moved forward on a more expeditious
7 manner that reduces expense and reduces delay, and
8 serves the interest of justice. We had a discussion,
9 and I explained that to counsel in chambers.

10 I am not going to fix a trial date today.
11 Judge Maurer has assigned this case to me for all
12 purposes, and I will not repeat all the discussions we
13 had concerning timing and various matters. A trial date
14 will be announced shortly. And Ms. Tift and Mr. Bailey
15 can rely on the general statements I made in terms of
16 how the case ought to be moving forward, and I think
17 we're looking at a trial date in the springtime, in all
18 likelihood. We will have to pin that down.

19 For today, because -- I thought it was a
20 very productive use of time in chambers, but our time is
21 rapidly vanishing assigned to this case. It's now
22 2:23 -- no, 2:37. I can't read the clock right. And we
23 have, at 2:45, we have another civil matter, and at 3:00
24 we have a preliminary injunction matter.

25 So in terms of what I am deciding and what

1 I am not deciding today, I am not deciding the motion
2 for partial summary judgment, except plaintiff has
3 conceded the -- what is it?

4 MS. COLLINGS-TIFT: Rest breaks.

5 THE COURT: Rest breaks. And the meal
6 breaks remains a disputed issue, but I am not deciding
7 that now. So we will have to schedule that in the
8 future. I am not deciding on the attorney's fees award,
9 and the motion for sanctions, per day sanctions, fine.
10 As I understand it, the parties are -- it's already been
11 submitted in writing. The parties are waiving oral
12 argument, and the next stage is simply to announce my
13 decision. But I am not going to announce it today. So
14 that's my understanding where we are on that matter.

15 Basically we're -- what we need to do is
16 deal with the discovery matters that are before the
17 Court, and as I -- because of the shortage of time, it's
18 my understanding, and because of everything else that
19 has been going on, that neither side is really asking
20 for oral argument, but are asking for rulings on these
21 discovery matters. Am I correct on that?

22 MS. COLLINGS-TIFT: We would stipulate to
23 submit them on the record, Your Honor.

24 MR. BAILEY: That's correct.

25 THE COURT: So let me first deal with the

EXHIBIT 3

1
2
3 IN THE CIRCUIT COURT OF THE STATE OF OREGON
4 FOR THE COUNTY OF MULTNOMAH
5

6 MICHAEL MIGIS, individually, and on
7 behalf of all other persons similarly
8 situated,,
9

10 Plaintiff,

11 vs.

12 AUTOZONE INC., a Nevada
13 Corporation,,
14

15 Defendant.
16

No. 0711-13531

**DEFENDANT'S MOTION FOR PARTIAL
JUDGMENT ON THE PLEADINGS AND
STATEMENT OF POINTS AND
AUTHORITIES IN SUPPORT**

[ORAL ARGUMENT REQUESTED]

17 **I. REQUEST FOR ORAL ARGUMENT**

18 Pursuant to Uniform Trial Court Rule 5.050, Defendant AutoZone, Inc. requests oral
19 argument on this motion. The time for oral argument is estimated to be 20 minutes. Court reporting
20 services are requested.

21 **II. UTCR 5.010 CERTIFICATE OF COMPLIANCE**

22 AutoZone hereby certifies that its counsel conferred with Bud Bailey, counsel for Plaintiff,
23 on May 20, 2008 regarding the issues set forth in this motion. Counsel for the parties were unable to
24 resolve this dispute.

25 **III. MOTION**

26 Pursuant to Oregon Rule of Civil Procedure 21B, Defendant AutoZone, Inc. ("AutoZone"),
brings this motion for judgment on the pleadings and moves the court for the following relief with
respect to Plaintiff Michael Migis' ("Migis") Class Action Allegation Complaint ("Complaint"): an
order granting partial judgment on the pleadings and dismissing Plaintiff's First and Second Claims

1 for Relief asserting meal and rest period violations because no private right of action for meal and
 2 rest period violations exists. In support of this motion, AutoZone relies on the following Points and
 3 Authorities, the Declaration of Amy R. Alpern ("Alpern Dec."), and the pleadings and records on file
 4 herein.

5 IV. RELEVANT FACTS

6 Migis purports to represent a broad class of "all current and former employees" who worked
 7 for AutoZone in Oregon for a period of six years prior to the date that the Complaint was filed on
 8 November 16, 2007. Migis has alleged violations of Oregon wage and hour laws, including
 9 violations of regulations regarding meal and rest periods. Migis's allegations are fundamentally
 10 flawed, rendering partial judgment on the pleadings proper. Specifically, because Oregon law
 11 provides no private right of action for these claims, they should be dismissed.

12 V. ARGUMENT AND AUTHORITY

13 ORCP 21B authorizes the court to enter judgment on the pleadings: "when the pleadings,
 14 taken together, affirmatively show that the plaintiff has not stated a claim for relief motion for
 15 judgment on the pleadings should be granted." *Slogowski v. Lyness*, 324 Or 436, 439, 927 P2d 587
 16 (1996) (quotation omitted). For purposes of an ORCP 21B motion, a court must accept the
 17 allegations of the pleading as true. *Beason v. Harclerod*, 105 Or App 376, 379-80, 805 P2d 700
 18 (1991). Judgment on the pleadings should be entered when, given the well-pleaded facts, the
 19 defendant is entitled to judgment as a matter of law. *Smith, et al. v. Washington County, et al.*, 180
 20 Or App 505, 523-24, 43 P3d 1171 (2002). Here, there is simply no legal basis for Migis's meal and
 21 rest period claims.

22 A. Migis's Rest Period Claim Should Be Dismissed

23 In his Complaint, Migis claims that AutoZone is liable to him and the putative class members
 24 for unpaid wages because it allegedly failed to provide them with statutorily required rest periods in
 25 violation of OAR 839-020-0050. However, on May 15, 2008, the Oregon Supreme Court held that
 26

employees do not have a private right of against their employers to recover unpaid wages for missed rest periods. *Gafur v. Legacy Good Samaritan Hospital and Medical Center*, ___ P.3d ___ (May 15, 2008) (See Attachment A). The claim for missed rest periods in *Gafur* was based on the same statute and regulations on which Migis relies for the missed rest period claims brought on behalf of himself and the putative class members. Because the Oregon Supreme Court's decision in *Gafur* expressly forecloses such a claim, Migis's claim for missed rest periods must be dismissed.

B. Migis's Meal Period Claim Should Be Dismissed

Migis also claims that AutoZone failed to provide him with statutorily required meal periods and therefore seeks unpaid wages from AutoZone on this basis. Migis is incorrect. As noted above, the Oregon Supreme Court foreclosed any claim by employees against their employers for missed rest periods. However, the Court did not consider whether the plaintiffs in *Gafur* could sue their employer for unpaid wages for missed meal periods. A brief history of the litigation in *Gafur* is necessary because it explains why Migis is not entitled to sue AutoZone for missed meal periods despite the fact that the Oregon Supreme Court expressly declined to consider the issue.

The plaintiffs in *Gafur* brought a class action complaint against their employer seeking compensation for required meal and rest periods they alleged were not provided to them. The employer filed a motion to dismiss and claimed that the plaintiffs did not have a private right of action available to them for the meal and rest period claims. The trial court agreed and dismissed the meal and rest period claims. The plaintiffs appealed to Oregon's Court of Appeals, *which agreed with the trial court as to the plaintiffs' meal period allegations and affirmed the trial court's dismissal of those claims*. However, the Court of Appeals agreed with the plaintiffs on their rest period claims and reversed the trial court's order dismissing that claim.

As noted above, the Oregon Supreme Court ultimately agreed with the trial court on the plaintiffs' rest period claims, reversed the Court of Appeals' decision, and affirmed the trial court's

CERTIFICATE OF SERVICE

I hereby certify that on May 22, 2008, I served a full, true, and correct copy of the foregoing:

**DEFENDANT'S MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS AND
STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT**

- ☐ By delivery via messenger, or otherwise by hand,
☒ By facsimile,
☐ By e-mail,
☒ By mailing same, postage paid

addressed to:

Bailey Pinney & Associates LLC
Attorneys at Law
1498 SE Tech Center Place
Suite 290
Vancouver, WA 98683
Fax (360) 567-3331

Of Attorneys for Plaintiff

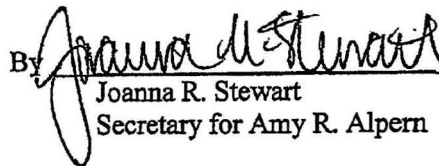
By 
Joanna R. Stewart
Secretary for Amy R. Alpern

EXHIBIT 4

**IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR MULTNOMAH COUNTY**

RICHARD JOANT and BERT YAMAOKO,
individually, and on behalf of all others similarly
situated,

Plaintiffs,

vs.

AUTOZONE, INC., a Foreign corporation,

Defendant.

No. 0503 02795

**PETITION FOR EXPEDITED
HEARING (Ex Parte)**

Comes now AutoZone, Inc., by the attorney named below, and petitions for an expedited hearing on the motion indicated below. The underlying motion is presented herewith for filing with the clerk.

1. Nature of the underlying motion for which an expedited hearing is requested:

☐ Motion to Compel ☐ Motion to Quash ☒ Other Motion as Follows:

2. Nature of the emergency which requires the setting of the motion to be expedited: Defendant's Motion Opposing Class Certification cannot be assigned a hearing date in the ordinary course during the week of November 28, 2005, because that date would fall after the call for trial date of November 4, 2005.

3. Trial Date: November 7, 2005; Date Certain? ☐ Yes ☒ No

4. The Civil Calendering Department of the Court has been contacted and indicates no hearing time is available prior to our trial date of November 7, 2005.

5. Judges who have heard previous motions in this matter are: The Honorable Frank L. Bearden.

6. Judges scheduled to hear pending motions in this matter are: N/A.

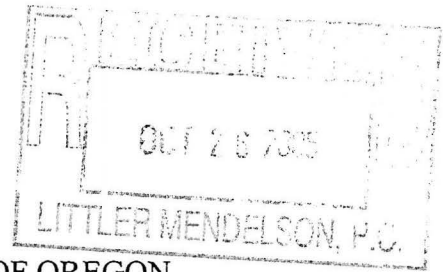
I certify to the court that I have complied with SLR 5.025 (3) regarding notice of this ex parte appearance to opposing parties.

DATED: October 24, 2005

Signature of Attorney:
Print name and OSB No.:

Laura Liebman-Alperson
Laura Liebman-Alperson, OSB NO. 02367

032895\00001\643366 V001



IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

RICHARD JOARNT and BERT
YAMAOKO, individually, and on behalf of
all others similarly situated,

Plaintiffs,

vs.

AUTOZONE, INC., a Foreign corporation,

Defendant.

Case No. 04C17199

**DEFENDANT'S MOTION IN
OPPOSITION TO CLASS
CERTIFICATION AND
STATEMENT OF POINTS AND
AUTHORITIES IN SUPPORT**

ORAL ARGUMENT REQUESTED

**DEFENDANT'S MOTION IN OPPOSITION TO CLASS CERTIFICATION AND STATEMENT OF POINTS
AND AUTHORITIES IN SUPPORT**



1 same event, practice, or course of conduct that applied to other putative class members, and,
 2 therefore, they do not meet the requirement of typicality. *See Retired Chicago Police Assoc.*
 3 *v. City of Chicago*, 141 FRD 477, 488 (ND Ill 1992), *aff'd in part, rev. in part on other*
 4 *grounds by* 7 F3d 584 (7th Cir. 1993). Indeed, "an appropriate evaluation of [typicality]
 5 requires an assessment of [the Plaintiffs'] individual complaints." *Bradford v. Sears,*
 6 *Roebuck & Co.*, 673 F2d 792, 796 (5th Cir 1982). Here, such an evaluation compels the
 7 conclusion that the claims being asserted by Joarnt and Yamaoka are not typical of other
 8 employees at AutoZone.

9 **D. Named Plaintiffs Are Not Adequate Class Representatives.**

10 Oregon law establishes that the test of adequacy depends upon a showing that
 11 (1) there are no disabling conflicts of interest between the class representatives and the class;
 12 and (2) the class is represented by counsel competent to handle such matters. *Alsea Veneer,*
 13 *Inc. v. State*, 117 Or App 42, 53, 843 P2d 492 (1992), *aff'd in part, rev. in part on other*
 14 *grounds by*, 318 Or 33 (1933), *citing Penk v. Oregon State Board of Higher Education*, 93
 15 FRD 45, 50 (D Or 1981). It is beyond dispute that a putative representative cannot
 16 adequately protect the class if the representative's interests are in conflict with those of other
 17 class members. *Smith v. Babcock*, 19 F3d 257, 265 (6th Cir 1994); *Brown v. Ticor Title Ins.*
 18 *Co.*, 982 F2d 386, 390 (9th Cir 1992) (there must be a sharing of interests between
 19 representatives and absentees and an absence of antagonism).

20 There are a myriad of such conflicts present here, rendering the named
 21 Plaintiffs inadequate representatives:

22 • In regard to Plaintiff Yamaoka: on the one hand, Yamaoka and Joarnt
 23 wish to press claims for unpaid wages, unpaid overtime, and damages resulting from
 24 AutoZone's alleged failure to allow rest and meal breaks on behalf of all AutoZone's Oregon
 25 current and formers employees who were employed for the past six years. Yet, on the other
 26

1 hand, Plaintiff Yamaoka testified that he altered subordinate employee's pay records (thus
 2 causing them to suffer unpaid wages), he refused to allow Joarnt to take his meal breaks, and
 3 he directed employees to drive and perform other work off the clock. (See Yamaoka Depo.,
 4 53:14-54:14; 70:21-71:15; 85:16-25; 97:11-98:7.) How, then, could Yamaoka purport to
 5 represent employees whose records he altered and whom he required to perform work off the
 6 clock?

7 • As between Joarnt and Yamaoka: Plaintiff Joarnt claims to have
 8 negotiated terms of employment with his interviewer, but Plaintiff Yamaoka did not
 9 negotiate terms and did not believe he had a contract of employment. The positions of the
 10 named plaintiffs, therefore, are diametrically opposed, and Joarnt's testimony regarding a
 11 "contract of employment" will be directly contradicted by Yamaoka's.

12 • As between the named Plaintiffs and members of the putative class
 13 who are current employees: Plaintiffs propose to pursue multiple, cumulative penalties for
 14 AutoZone's alleged failure to timely pay final wages. For example, Plaintiffs' counsel has
 15 outlined a theory whereby multiple penalties might accrue when AutoZone (allegedly) fails
 16 to pay employees for time worked, thus incurring a penalty, and then (allegedly) fails to
 17 timely pay final wages. While the Plaintiffs' theory is unsound,¹⁷ it is a theory that
 18 necessarily inures to the benefit of terminated employees, but not current employees—
 19 because "civil penalties provided in ORS 652.150" (see ORS 653.055(1)(b)) are, in specific
 20 terms, limited to "penalty wages for failure to pay wages on termination of employment."
 21 See ORS 652.150. Stated another way, former employees may seek penalty wages for failure

22
 23 ¹⁷ Plaintiffs' counsel have explained to AutoZone's counsel their theory that they are entitled
 24 to "stack" statutory penalties, i.e., when an employee is not properly paid for all hours and
 25 wages owed in a pay period, ORS 653.055 provides for penalty wages not to exceed 30 days
 26 and then again when employees are terminated and continue to be owed wages at
 termination, another penalty arises out of ORS 652.140-.150. (See Kisch Dec., ¶ 3)
 AutoZone strongly disputes the validity of Plaintiff's theory, but for purposes of this motion
 only, AutoZone accepts it as true.

1 to timely pay final wages (ORS 652.150) or overtime and/or minimum wage (ORS 653.055).
 2 Current employees, however, can only seek penalty wages for failure to pay overtime or
 3 minimum wage. ORS 653.055. Plaintiffs, both of whom are terminated employees, will
 4 necessarily have an interest in maximizing the recovery of this class of employees, and little
 5 interest in watching out for the interests of current employees. Likewise, there are no
 6 statutory provisions that provide for damages or penalty wages for failure to provide lunch or
 7 rest breaks in private rights of action, provided the employees were paid for their time
 8 worked – as Joarnt testified he was. Joarnt's testimony will result in a direct conflict with
 9 any employee (should such a person exist) who was required to clock out and work through
 10 his or her lunch period because that was not Joarnt's experience.

11 ORCP 32 A requires that named plaintiffs adequately and fairly represent the
 12 class. In circumstances when there is a conflict of interest between the named Plaintiffs and
 13 the purported class, then the named Plaintiffs cannot adequately represent the interests of the
 14 class. *See, e.g., Matarazzo v. Friendly Ice Cream Corp.*, 62 FRD 65, 68-69 (EDNY 1974)
 15 (plaintiff could not represent current store managers because plaintiff no longer held such
 16 position); *Donaldson v. Microsoft Corp.*, 205 FRD 558, 568 (WD Wash 2001) (named
 17 plaintiffs had been obligated to implement the very supervisory system challenged by the
 18 lawsuit). The present action is rife with similar conflicts of interests such that named
 19 Plaintiffs cannot represent any the purported class.

20 Finally, the named Plaintiffs are not suitable class representatives because of
 21 the inherent weakness of their claims. "...[I]f the class representative's claims are both weak
 22 and typical – if the case as a whole is as weak as the representative's individual claim - then
 23 the case should be dismissed, with or without class certification." *Robinson v. Sheriff of*
 24 *Cook County*, 167 F.3d 1155, 1157 (7th Cir. 1999) (citation omitted). As demonstrated
 25 above, named Plaintiffs have made admissions that defeat a number of their claims. The fact
 26

1 is that these individuals are incapable of pursuing their own claims adequately, let alone
2 those of an entire class.

3 **E. Plaintiffs Have Not Shown That Common Issues Predominate And That**
4 **A Class Action is Superior to Other Means of Proceeding**

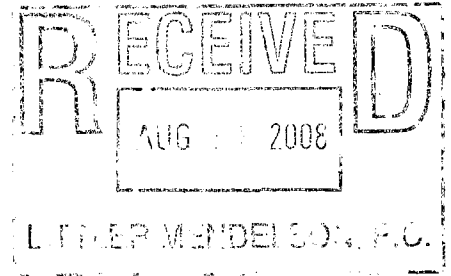
5 Plaintiffs allege that this lawsuit satisfies the criteria of ORCP 32 B(3). (*See*
6 *Complaint*, ¶ 47). However, ORCP 32 B(3) sets a very stringent standard, and simply
7 meeting the threshold commonality requirement of commonality is not enough. *Poulos v.*
8 *Caesars World Inc.*, 379 F3d 654, 664 (9th Cir 2004). First, not only must common issues of
9 law or fact exist, common issues must predominate. Notably, this element of class
10 certification is actually stricter under Oregon law than under FRCP 23. "[T]he scope of the
11 class action in Oregon was intended to be circumscribed to a greater extent than is the case
12 under some federal courts' interpretation of Rule 23." *First Nat'l Bank*, 275 Or at 152.¹⁸

13 As explained in *First Nat'l Bank*, the Oregon legislature adopted more
14 restrictive amendments to the text of Fed. R. Civ. P. 23 to ameliorate perceived abuses under
15 the federal class action rules – which were seen as too liberal and capable of producing "an
16 unmanageable burden which [might] overwhelm judicial machinery and impose unfair and
17 even coercive pressures upon the parties." *Id.* at 152-53. Therefore, in accordance with
18 Oregon Rules of Civil Procedure, the Oregon Supreme Court proscribes certification of a
19 class action "when there appears to be a legitimate issue or defense which will require an
20 individual inquiry of a considerable number of the claimants" because to hold otherwise
21 "would attribute to the legislature an intention either to overload the courts with an

22 * * * *

23 * * * *

24
25 ¹⁸ *First Nat'l Bank* cites to ORS 13.220(2)(c), which was repealed in 1979 and replaced by
26 ORCP 32, which is substantively the same.



**IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH**

MICHAEL MIGIS, individually, and on
behalf of all other persons similarly situated,

Plaintiff,

v.

AUTOZONE, INC., a Foreign Corporation,
Defendant.

Case No. 0711-13531

**PLAINTIFF'S ORCP 32 N(2)
STATEMENT OF FINANCIAL
ARRANGEMENTS**

Pursuant to ORCP 32N(2), Plaintiff Michael Migis, through his attorney herein, files
the attached class action contingent fee agreement in the above-captioned matter.

DATED this 11th day of August 2008.

BAILEY, PINNEY & ASSOCIATES, LLC

A handwritten signature in cursive script, appearing to read "A. E. Bud Bailey", written over a horizontal line.

A. E. BUD BAILEY, OSB 75308
Attorney for Plaintiff

CERTIFICATE OF SERVICE

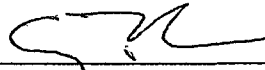
I hereby certify that I caused to be served the foregoing **Plaintiff's ORCP 32 N(2) Statement of Financial Arrangements** upon:

Ms. Leigh Ann Tift
Littler Mendelson
One Union Square, 600 University St, Ste 3200
Seattle, WA 98101

by the following indicated method or methods:

[X] by **mailing** a full, true, and correct copy thereof in a sealed, first-class postage-prepaid envelope, addressed to the person as shown above, the last-known office address of the person, and deposited with the United States Postal Service at Vancouver, Washington on August 11, 2008.

DATED: August 11, 2008



CHEY POWELSON, OSB 035512
Of Attorneys for Plaintiff

Bailey, Pinney & Associates, LLC

Attorneys at law

CLASS ACTION CONTINGENT FEE AGREEMENT

Michael Migis vs. Auto Zone CLASS ACTION DISCLOSURES

You have the right to bring your claim either by yourself alone, or for yourself and on behalf of a class of other people who are similarly affected. There are some important differences between suing only for yourself and suing on behalf of a class.

1. If you sue for a class, you have responsibilities to the class as a whole.
2. If you sue for yourself, you can settle your case at any time on any terms. If you sue on behalf of a class, any settlement must be fair to the entire class and must be approved by the Court.
3. What you recover could depend on whether or not you are suing for a class.
4. In an individual action, you control the decision your lawyers make. In a class action, the lawyers have a fiduciary duty to the class as a whole, so they may make litigation decisions contrary to your directions, subject ultimately to the control of the Court.

The attorneys are willing to undertake this case on behalf of a class. By signing this Agreement, you acknowledge that you have had an opportunity to discuss this matter if you wish with independent counsel and have decided that you wish attorneys to represent you in pursuing your claim for yourself and on behalf of other people similarly situated.

I, Michael Migis, hereby employ Bailey, Pinney & Associates, LLC (collectively, "attorneys") as my attorneys to represent me in claims against Auto Zone. I agree to be a class representative in this class action litigation, subject to the following terms.

I. CONTINGENT FEE

There will be no attorney fees charged unless this case is successfully prosecuted. The fee will be one third (1/3) of the gross amount collected by way of settlement, trial or appeal, subject to any upward or downward adjustment the Court might make based on the factors normally applied in assessing reasonable attorney fees against a class recovery. This contract is not be construed as a limitation on the maximum reasonable fee to be awarded to the attorneys by the Court.

II. COSTS

The attorneys will advance the payment of costs reasonably necessary to prepare the case until a recovery is obtained. "Costs" include filing fees, witness fees, expert witness costs, travel expenses, copying charges, fax charges, deposition costs, investigator costs and time, messenger service costs, mediation expenses, computer research fees, and all out-of-pocket expense incurred on my behalf. Costs will be apportioned among the class members pro-rata, if recovery is made, to the extent not taxed against Auto Zone.

If no recovery is made, You are liable for costs, but only to the extent of your ability to pay such costs.

III. AUTHORIZATION TO ASSOCIATE OTHER ATTORNEYS, FEE SPLITS

Plaintiff authorizes attorneys to associate other attorneys as they deem necessary so long as any other attorney agrees to be bound by this Agreement. The Plaintiff understands that both the Bailey Pinney firm and those attorneys associated on this case may apply to the Court for award of the attorney fees incurred in this case. Any fees awarded will be either applied as payment for the attorney fees incurred or paid into the general recovery fund to reduce in part the contingency fee to be paid. The Plaintiff understands that the Bailey Pinney firm may enter into various fee arrangements including the splitting of fees with the associated attorneys. Such fee arrangements and fee splitting agreement will not increase the total percentage amount to be paid for attorney fees. The Plaintiff by signing this agreement expressly approves of and consents to the Bailey Pinney firm entering into fee arrangements and fee splitting agreements with any attorney associated on this case. The Bailey Pinney firm agrees to make any fee agreement or arrangement with any attorney associated on this case available for review by Plaintiff upon written request provided to the Bailey Pinney firm offices at 1498 SE Tech Center Place, Suite 290, Vancouver, Washington 98683.


IV. RIGHT OF ATTORNEY TO WITHDRAW

The attorneys reserve the right to withdraw from the case if the Court does not certify a class.

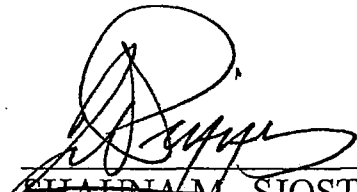
V. SIGNATURE OF THE PARTIES

This contract contains the entire Agreement and is not valid unless signed by both parties. By signing this agreement, you acknowledge you have read this Agreement, and, the terms and conditions of the Agreement have been explained to you by one of the attorneys, and you acknowledge you have received a copy of this fee Agreement.

DATED: 09-24-06


Michael Migis

DATED: 9-22-06


SHAUNA M. SJOSTROM, OSB 04418
Bailey, Pinney & Associates, LLC

1
2
3
4 **IN THE CIRCUIT COURT OF THE STATE OF OREGON**
5 **FOR THE COUNTY OF MULTNOMAH**

6 **MICHAEL MIGIS**, individually and on
7 behalf of all others similarly situated,

8 Plaintiffs,

9 v.

10 **AUTOZONE, INC.,**

11
12 Defendant.

Case No. 0711-13531

**PLAINTIFF MIGIS' MOTION FOR
ORCP 32C CLASS ACTION
CERTIFICATION**

(Oral Argument Requested)

(Hearing Date to Be Set by the Court,
Pursuant to the May 2008 Case
Management Order)

13
14
15 **REQUEST FOR ORAL ARGUMENT:** Pursuant to UTCR 5.050, Plaintiff estimates the time
16 needed for oral argument to be 2 hours 30 minutes. Court reporter services are not required.

17 **I. MOTION**

18 Pursuant to ORCP 32C and on behalf of all others similarly situated, PLAINTIFF MIGIS
19 by his attorneys moves this Court for an order certifying the following classes defined as:

- 20 1. **Final Wages:** Those individuals working as hourly employees for Defendant
21 AutoZone in Oregon between November 16, 2004 and November 16, 2007, and
22 who AutoZone failed to timely provide all wages earned and unpaid at the time
23 of termination, as required by ORS 652.140(1) - (2)(b).
24 2. **Off-the-Clock:** Those individuals working as hourly employees for Defendant
25 AutoZone in Oregon between November 16, 2001 and November 16, 2007, and
26

1 who AutoZone required to perform uncompensated "off-the-clock" work for the
2 benefit of AutoZone.

3 3. **Meal Periods:** Those individuals working as hourly employees for Defendant
4 AutoZone in Oregon between November 16, 2001 and November 16, 2007, and
5 who AutoZone failed to provide uninterrupted meal periods of at least 30 minutes
6 required by ORS 653.261 and OAR 839-020-0050(1)(a), and failed to pay
7 employees for meal periods less than 30 minutes.

8 4. **Minimum Wage / Overtime:** Plaintiff also moves the Court pursuant to ORCP
9 32G to certify a minimum wage and overtime wages class for those individuals
10 who were subjected to either an overtime or minimum wage violation as a result
11 of Defendant's failure to pay all wages because of off-the-clock or meal period
12 time worked.

13 Plaintiff supports this *Motion* with the *Declaration of Chey K. Powelson* ("Powelson
14 Decl."), the *Declaration of Michael Migis*, the *Declaration of Karen A. Moore*, the *Declaration*
15 *of George Shubin* ("Shubin Decl."), and the *Declaration of J. Dana Pinney* ("Pinney Decl.").
16

17 II. APPLICABLE SUBSTANTIVE LAW

18 A. Payment of Final Wages

19 A central purpose of Oregon's wage statutes is that, due to the "disparity of economic
20 power" between the employee and employer, the employee "shall be assured of prompt payment
21 for his labors when the relationship is terminated." *Lamy v. Jack Jarvis & Company, Inc.*, 281
22 Or 307, 313 (1978). Accord, *State ex rel Nilsen v. Oregon State Motor Assoc.*, 248 Or 133, 138
23 (1957) ("The policy of the statute is to aid an employe [sic] in the prompt collection of
24 compensation due him and to discourage an employer from using a position of economic
25 superiority as a lever to dissuade an employe [sic] from promptly collecting his agreed
26

1 compensation.”).

2 “When an employee who * * * quits employment, all wages earned and unpaid at the time
3 of quitting become due and payable immediately if the employee has given to the employer not
4 less than 48 hours’ notice, excluding Saturdays, Sundays and holidays, of intention to quit
5 employment.” ORS 652.140(2)(a) (underline added).

6 If the employee does not give notice, then “the wages become due and payable within five
7 days, excluding Saturdays, Sundays and holidays, after the employee has quit, or at the next
8 regularly scheduled payday after the employee has quit, whichever event first occurs.” ORS
9 652.140(2)(b) (underline added).

10 Finally, “[i]f employment termination occurs on a Saturday, Sunday or holiday, all wages
11 earned and unpaid shall be paid no later than the end of the first business day after the
12 employment termination[.]” ORS 652.140(3).

13 Oregon’s statutes regarding the payment of final wages “place the burden on the employer
14 to pay the wages, not on the employee to ask for them.” *Wales v. Walt Stallcup Enters.*, 167 Or
15 App 212, 215 (2000). Accord, *Emery v. Portland Typewriter & Office Machine*, 86 Or App 635,
16 638 (1987) (“[W]e see no reason why plaintiff’s failure to pick up her wages on her termination
17 date, as she had said she would, should be a waiver of her right to receive immediate payment.”).
18 Moreover, ORS 652.150(1) provides:

19 [I]f an employer **willfully** fails to pay any wages or compensation of
20 any employee whose employment ceases, as provided in ORS 652.140
21 and 652.145, then, as a penalty for the nonpayment, the wages or
22 compensation of the employee shall continue from the due date thereof
23 at the same hourly rate for eight hours per day until paid or until action
therefor is commenced.

24 “Action that is careless * * * can be ‘willful or ‘knowing,’” as can an action that “is fully
25 knowing, intentional, and voluntary.” *Wilson v. Smurfit Newsprint Corp.*, 197 Or App 648, 662
26 (2005). “An employer, then, willfully fails to pay wages owed at termination only if it is ‘fully

1 aware of [its] obligation to do so' but nonetheless consciously and voluntarily decides not fulfill
 2 that obligation." *Id.* at 660.¹ Accord, *Wyatt v. Body Imaging, PC*, 163 Or App 526, 531 (1999),
 3 *rev. den.*, 330 Or 252 (2000). See also *Powelson Decl.*, Ex. 30 (September 26, 1986 Letter from
 4 Oregon State Dept. of Justice to Commissioner of Oregon State Bureau of Labor & Industries
 5 regarding "Applicability of the Penalty Provision of the Wage Claim Statutes to a Careless
 6 Employer.").

8 **B. Payment of Wages for "Hours Worked"**

9 The Oregon State Legislature defines "wages" as "compensation due to an employee by
 10 reason of employment * * * ." ORS 653.010(10). "The word 'employment' is not defined in
 11 the statutes, but the word 'employ' means 'to suffer or permit to work' (excluding voluntary or
 12 donated services). ORS 653.010(2). Under ORS 653.055, then, the extent to which an employee
 13 is 'entitled' to wages depends on whether and for how long he or she was suffered or permitted
 14 to 'work.'" *Gafur v. Legacy Good Samaritan Hosp. & Med. Ctr.*, 344 Or 525, 530 (2008).

15 An employer must pay an employee for all hours worked. "'Hours worked' includes
 16 'work time' as defined in ORS 653.010(12)." OAR 839-020-0004(20) (Definitions). "Work
 17 time" means "both time worked and time of authorized attendance." ORS 653.010(11) (2003).
 18 Time worked and time of authorized attendance also means meal periods of less than 30 minutes.

20 **C. Failure to Pay All Wages Due for Deducted Meal Periods**

21 The Bureau of Labor & Industries defines an "appropriate meal period" as a "period of
 22 not less than 30 minutes during which the employee is relieved of all duties for each work period
 23 _____

24 ¹ "Every employer regulated under ORS 653.010 to 653.261 must maintain and preserve
 25 payroll or other records containing the following information and data with respect to each
 26 employee to whom the law applies: * * * **Date of payment** and the pay period covered by
 payment." OAR 839-020-0080(1)(l) (emphasis added).

1 of not less than six or more than eight hours,” OAR 839-020-0050(1)(a)(A) (underline added),
 2 or a “period in which to eat (for each work period of not less than six or more than eight hours)
 3 while continuing to perform duties or remain on call, which is not deducted from the employee’s
 4 hours worked.” OAR 839-020-0050(1)(a)(B) (underline added).²

5 The employee must be paid meal periods that are interrupted or are less than 30 minutes
 6 long. Interrupted or less than 30 minutes constitutes “work time” for which the employee is
 7 entitled to recover wages under ORS 653.055(1).³

8 III. BACKGROUND

9 A. Overview

10 As the putative class representative, named Plaintiff Michael Migis filed this lawsuit on
 11 November 16, 2007 on behalf of himself and all current and former Oregon AutoZone employees
 12 having various claims against Defendant, including claims for: unpaid wages, untimely payment
 13 of final wages, unpaid overtime wages, unpaid minimum wages, and penalty wages deriving from
 14 violations of Oregon law regarding meal periods, and timely payment of wages upon termination
 15 from employment. The relevant claims periods for this case (depending on the claim alleged)
 16 range from two (2) to six (6) years back from the date of filing.

17 In July 2008 Plaintiff Migis filed a motion for coordination or consolidation with another
 18 putative class action, *Joarnt v. AutoZone, Inc.* (Mult. Co. Case No. 0503-02795). The
 19 Multnomah County Presiding Court has not ruled or otherwise set a hearing to manage this
 20 matter. However, since the same attorneys represent plaintiffs in the *Joarnt* action, the *Joarnt*
 21 plaintiffs are willing and able to file a substantially similar motion for class certification, once

22
 23 ² “[A]n agency’s interpretation of its statutory authority is entitled to deference by the
 24 courts and [courts] cannot substitute [their] policy ideas for those of the agency.” *Miller v. OLCC*,
 42 Or App 555, 561 (1979). See also, *Springfield Educ. Assoc. v. Springfield Sch. Dist. No. 19*,
 290 Or 217, 221 (1980).

25 ³ See also *Powelson Decl.*, Ex. 34 (BOLI poster); and Ex. 35 (BOLI explanation and
 26 frequently asked questions about meal periods).

1 Presiding Court rules whether coordination or consolidation is appropriate.

2

3 **B. Final Payment of Wages (Three Year Claim Period)**

4 AutoZone's own store managers recognize that "[m]ost employees live from paycheck
5 to paycheck * * * ." *Powelson Decl.*, Ex. 1 (Deposition of AutoZone Store Manager Felipe
6 Carerra, p. 93:14-15). Regularly-scheduled paydays for AutoZone employees occurred every two
7 weeks. *Id.*, Ex. 2 (Employee Handbook).

8 AutoZone practice is generally the same when processing a final paycheck for an
9 employee who is fired or someone who quits with two weeks' notice. *Powelson Decl.*, Ex. 3
10 (Deposition of AutoZone Payroll Manager Kevin Bussey, pp. 26:23 - 27:1). Cf. *id.*, Ex. 4
11 (Deposition of AutoZone Regional Manager James Kulbacki, p. 55:14-19).

12 AutoZone's "computer system in the store will print [for the Store Manager] a process for
13 requesting a final check * * * ." *Powelson Decl.*, Ex. 5 (Deposition of AutoZone HR Manager
14 Nicole McCollum, p. 34:5-13). To manually process an Oregon hourly employee's final
15 paycheck, AutoZone's corporate Payroll Department in Memphis, Tennessee must receive a
16 phone call from its Oregon field staff. *Powelson Decl.*, Ex. 6 (October 2005 e-mail from
17 AutoZone Director of Payroll Mark Dessem); and Ex. 4 (Kulbacki Dep., p. 53:3-9).

18 Only after receiving a phone call from the store does AutoZone practice allow corporate
19 headquarters personnel to "write up a check request and that check leaves [Memphis] the same
20 day and is sent out overnight mail, FedEx." *Powelson Decl.*, Ex. 7 (Deposition of AutoZone's
21 Director of Payroll Mark Dessem, p. 65:1-12); and Ex. 8 (Deposition of AutoZone District
22 Manager Ed Wesner, p. 85:12-16). AutoZone's Director of Payroll has conceded that Defendant
23 does not have an automated report that would trigger a hand-cut check without that phone call.
24 *Id.*, Ex. 7 (Dessem Dep., p. 18:11-14).

25 ///

26

1 The process of corporate personnel taking a phone call from a store manager should result
 2 in a hand cut, manual check identified as "off cycle." *Powelson Decl.*, Ex. 7 (Dessem Dep., p.
 3 68:8-24). AutoZone's ORCP 39C(6) designee confirmed during a May 15, 2008 deposition that
 4 in the Excel summary report, "Off Cycle mean[s] that we have a period for pay cycles. 'Yes'
 5 means it was paid during the pay cycle; 'no' means it was paid between cycles." *Id.*, Ex. 9 (ORCP
 6 39C(6) Dep. of AutoZone, p. 90:14-23). So if there is no phone call, there can be no subsequent
 7 check request or "off cycle" check.

8 During the relevant period of time, AutoZone knew Oregon's requirements regarding the
 9 payment of final wages to terminating employees. *Powelson Decl.*, Ex. 10 (p. 2 ("Oregon Final
 10 Pay")); and Ex. 5 (McCollum Dep., p. 36:14-37:1). For example, if an employee gave 48 hours'
 11 advance notice on a Monday workday of their intention to quit by the end of the work day on
 12 Wednesday, AutoZone knew Oregon law required providing final wages to that employee on that
 13 Wednesday, the last day worked. *Id.*, Ex. 11 (Deposition of AutoZone Oregon District Manager
 14 Edward Rogers, p. 87:9-16); and Ex. 8 (Wesner Dep., p. 84:12-22).

15 Despite such knowledge, AutoZone's Regional Manager testified that if an employee gave
 16 two weeks' notice of their intention to quit employment on a Friday, normal procedure would be
 17 for the store manager to *wait until the employee worked through that last day* before calling
 18 corporate headquarters for a final paycheck. *Powelson Decl.*, Ex. 4 (Kulbacki Dep., p. 54:1-12:
 19 stating the phone call "would probably be made right at the end of the shift so they know how
 20 many hours they worked.").

21 This may be a moot point, however, because AutoZone's Excel summary termination
 22 report reveals that for those approximately 158 hourly employees who terminated employment
 23 in the year preceding this lawsuit, approximately 128 *did not* receive any type of manual, Off
 24 Cycle paycheck for their final wages. *Powelson Decl.*, Ex. 12 (Termination Report, "Off Cycle"
 25 column); and Ex. 33 (electronic Variance Report). Rather, it appears AutoZone issued those
 26

employees' paychecks in the normal course of business, according to their twice-monthly Friday pay cycle. See *id.*, Ex. 13 (2006 - 2007 annual calendars). (The date of the check in the summary report is when the check was generated. *Id.*, Ex. 9 (May 15, 2008 ORCP 39C(6) Dep., p. 91:3-23)).

That 128 out of 158 terminating employees were not issued Off Cycle checks means that, regardless of how an employee's employment would end, there was an 80 percent chance⁴ a Store Manager would not call corporate headquarters to request a final paycheck.⁵ Of 158 employees on the Excel summary termination report, approximately 121 did not receive their final wages within the time-lines set forth in ORS 652.140. See *Declaration of Karen A. Moore*, Ex. 1, ¶ 2 (analyzing 157 employees).

This is due to AutoZone's apparent failure to provide any training for or reminders to its Oregon store managers regarding the timely payment of final wages. For example, in October 2005, AutoZone's Director of Payroll issued a terse, two-sentence e-mail to two regional managers with authority over Oregon, reminding them that field staff should "call in all Oregon terminations on a timely basis to the Payroll Department so that we may issue the appropriate manual check for their final pay." *Powelson Decl.*, Ex. 6.

According to AutoZone counsel, this is the only e-mail or memorandum AutoZone issued

⁴ (128 / 158)

⁵ During Plaintiff's May 15, 2008 ORCP 39C(6) deposition of AutoZone, AutoZone's designee completely failed to testify as to the meaning of AutoZone's own job termination categories, including the difference, if any, between "Abandoned Job" and "Quit Without Notice." See *Powelson Decl.*, Ex. 9 (ORCP 39C(6) Dep., pp. 92:7 - 98:2; pp. 100:10 - 102:3).

1 to its Oregon field staff between October 2005 and November 2007.⁶

2 Plaintiff Migis alleges he did not receive his final paycheck within the time Oregon law
3 requires. Plaintiff informed AutoZone by no later than February 8, 2006 he was quitting
4 employment, effective immediately. AutoZone did not, however, *issue* a final paycheck until
5 February 15, which was seven calendar days (and therefore five business days) after Mr. Migis
6 quit. *Powelson Decl.*, Ex. 13 (2006 calendar); and Ex. 14. See also *Declaration of Michael*
7 *Migis*, Ex. B. Since according to AutoZone the date of a paycheck only indicates when it was
8 generated, and it takes at least one business day to send a check from Memphis to Oregon, then
9 AutoZone could not have provided Mr. Migis his final paycheck any sooner than February 16,
10 which is one business day after it was due.

11 But AutoZone did not tender Plaintiff Migis' final wages to him even on February 16.
12 Rather, Plaintiff Migis received his final paycheck on February 27, 2006. *Declaration of Michael*
13 *Migis*, ¶ 5; *Powelson Decl.*, Ex. 15 (Deposition of Michael Migis, pp. 102:22 - 103:4; pp. 108:22
14 - 109:3; p. 117:1-13; p. 118:16-25). This is consistent with the practice AutoZone's Regional
15 Manager described: AutoZone does not necessarily take affirmative steps to send an employee
16 their final paycheck, but rather "in many cases [when an employee terminates employment], the
17 employee knows it's coming and would be there to get it." *Powelson Decl.*, Ex. 4 (Kulbacki
18 Dep., p. 56:4-15) (also confirming that generally the employee comes back to the store to pick
19 up the check).

20 ///

21 ///

22
23 ⁶ Defendant's counsel has represented that AutoZone has produced all documents,
24 including all e-mails, relating to: (1) Defendant's efforts to ascertain and/or comply with the
25 requirements of ORS 652.140 in the two (2) year time period prior to the filing of the Complaint
26 in this matter, through the date of filing, for those Oregon hourly employees who left AutoZone
employment during that period; and (2) containing, referencing, or otherwise relating to
Defendant's policies, procedures, and/or practices for the termination, voluntary or involuntary,
of Oregon AutoZone hourly employees. *Powelson Decl.*, ¶ 7.

1 **C. Off-the-Clock Work (Opening & Closing the Store / Delivery of Parts to Different**
 2 **Stores) (Six Year Claim Period)**

3 Plaintiff alleges that "AutoZone also benefitted from uncompensated 'off the clock' work
 4 performed before and/or after shifts by Plaintiff and others similarly situated. Plaintiff and others
 5 similarly situated performed services as AutoZone requested. AutoZone has not paid for the
 6 services Plaintiff and others similarly situated performed." Complaint, ¶ 27.

7 For example, AutoZone required its Oregon hourly employees to: (1) work off the clock
 8 when both opening and closing AutoZone stores for the day because the process of doing so
 9 involved tasks to be performed before clocking in, and after clocking out, respectively, of
 10 AutoZone's time-keeping system; and (2) deliver or "transfer" parts and merchandise from one
 11 AutoZone store to another while not clocked into the time-keeping system.⁷

12 AutoZone's policy and practice is to pay its hourly employees only for the time they are
 13 clocked in the time-keeping system. *Powelson Decl.*, Ex. 11 (Rogers Dep., p. 76:23: "you clock
 14 out, you don't get paid."), Ex. 8 (Wesner Dep., p. 54:18-19: "Once you have clocked out, you
 15 have clocked out," p. 84:5-12), and Ex. 3 (Bussey Dep., p. 24:7-8: "[Employees] get paid for
 16 what they've clocked in as working, yes;" and p. 26:6-8: "[Employees] get paid for the hours that
 17 they have worked and that they are logged in. That is our policy."). The policy is corporate-wide.
 18 *Id.*, Ex. 3 (Bussey Dep., p. 24:12-14).⁸

19 At the store level, an hourly employee generally clocks in and out at a cash register using
 20 a unique password. *Powelson Decl.*, Ex. 7 (Dessem Dep., p. 37:2-8); Ex. 8 (Wesner Dep., pp.

21 ⁷ Plaintiff Migis has also testified working off-the-clock in other circumstances, and
 22 personally observed other hourly employees working off-the-clock. *Powelson Decl.*, Ex. 15
 23 (Migis Dep., pp. 20:19 - 21:10; 23:5 - 24:14; 74:19-23; 126:4-25; 150:25 - 151:10; 157:16-24).
 24 He also testified that for end of the week processing on Saturday nights, to avoid incurring too
 many employee hours for that pay week, AutoZone managers would move employee time to the
 next day. *Id.* (pp. 90:22 - 93:7; 94:12 - 95:16).

25 ⁸ AutoZone's ORCP 39C(6) designee testified he was not aware of any company practice
 26 or policy to discipline employees who failed to report all time worked. *Powelson Decl.*, Ex. 9
 (ORCP 39C(6) Dep., pp. 78:23 - 79:17).

1 44:22 - 45:11); and Ex. 16 (Deposition of AutoZone Store Manager David Suhl, p. 43:16-20).
 2 However, a Store Manager can also clock employees out by using a computer. *Id.*, Ex. 1 (Carrera
 3 Dep., pp. 57:8 - 58:4).

4 **1. Opening and Closing the Store**

5 "AutoZone has guidelines that need to be followed when opening and closing the store."
 6 *Powelson Decl.*, Ex. 17 (AutoZone's "Being a Manager" 2005 Training & Development guide).
 7 A fundamental guideline is that "[t]wo AutoZoners are required to open or close the store." *Id.*
 8 Salaried store managers and hourly Parts Sales Managers are authorized to open and close stores.
 9 *Id.*, Ex. 11 (Rogers Dep., p. 68:17-22). However, Store Managers are not always present for
 10 opening or closing. *Id.*, Ex. 11 (Rogers Dep., p. 69:1-6). This leaves opening and closing to an
 11 hourly Parts Sales Manager and at least one other hourly employee.

12 **a. Opening the Store**

13 Opening a store includes unlocking the store's door and ensuring the alarm system is on,
 14 disarming the alarm, and then turning on the store computer and cash registers. *Powelson Decl.*,
 15 Ex. 17 (p. 11); Ex. 16 (Suhl Dep., p. 21:1-7); Ex. 18 (Deposition of AutoZone employee Joe
 16 Leach, pp. 39:21 - 40:17); and *Declaration of Michael Migis*, ¶ 3. AutoZone's alarm system is
 17 maintained by a company related to AutoZone. *Powelson Decl.*, Ex. 11 (Rogers Dep., pp. 67:24 -
 18 68:3).

19 Both AutoZone's alarm records and Plaintiff Migis' testimony confirm he opened and
 20 closed the Oregon stores in which he worked. *Powelson Decl.*, Ex. 15 (Migis Dep., p. 93:19-20);
 21 and Ex. 19 (alarm records). But because Plaintiff followed AutoZone procedure, he engaged in
 22 work that AutoZone never paid simply because he could not be clocked into the time-keeping
 23 system.

24 A representative comparison of Migis' hourly time records with corresponding store alarm
 25 records reveals clearly measurable, off-the-clock time between de-activating the alarm system and
 26

1 clocking into the time-keeping system. *Powelson Decl.*, Ex. 20 (time records); Ex. 19 (alarm
2 records); and Ex. 21 (OTC Summary No. 1). On several occasions, this off-the-clock time
3 resulted in not just unpaid wages, but also unpaid *overtime*. *Id.*, Ex. 22 (OTC Summary No. 2).

4 **b. Closing**

5 Just as when opening the store, by following AutoZone's closing policy and procedures
6 Plaintiff Migis also engaged in work for which Defendant did not pay him.

7 Defendant's "Closing the store" policy required that "a manager and at least one other
8 AutoZoner close the store every day." *Powelson Decl.*, Ex. 17 (p. 12). See also *id.*, Ex. 1
9 (Carrera Dep., p. 54:18-21: stating "Two minimum;" and p. 55:13-17); and Ex. 18 (Leach Dep.,
10 pp. 41:19 - 42:5). The procedure for closing the store required a manager, such as an hourly Parts
11 Sales Manager, to: (1) "Run the End of Day Report;" and (2) "Walk through the entire store to
12 see that all recovery tasks have been satisfactorily completed." *Id.*, Ex. 17 (p. 13); and Ex. 23
13 (Deposition of AutoZone employee Jose Luis Sardineta, p. 34:2-13). Sometimes more than two
14 hourly employees close the store. *Id.*, Ex. 23 (Sardineta Dep., pp. 33:16 - 34:18); and Ex. 18
15 (Leach Dep., p. 42:1-5). AutoZone policy requires that employees leave together. *Id.*, Ex. 17 (p.
16 14).

17 Running the "End of Day Report" included processing the end of day employee payroll,
18 which meant clocking out all employees who were still on the store premises. *Powelson Decl.*,
19 Ex. 1 (Carrera Dep., p. 56:7 - 21); and Ex. 18 (Leach Dep., p. 41:6-25). In fact, Plaintiff Migis
20 testified that on more than one occasion another manager "would do the end-of-day processing
21 while I was still out on a sales floor working, along with any other employees that might have
22 been in the store, the same thing happened to them at the same time that it happened to me."
23 *Powelson Decl.*, Ex. 15 (Migis Dep., pp. 71:17-22); and Ex. 17 (pp. 12-13: setting forth closing
24 store tasks for hourly employees).

25 Not only did AutoZone's end of day procedure result in off the clock time, but so too did
26 AutoZone's policy and procedure for the processing end of week employee payroll at the store

1 level. During deposition an AutoZone Parts Sales Manager described the end-of-week process
2 as follows:

3 * * * We go into payroll and end of day, which that would clock
4 everybody out of the system by 9:00. You have up to 9:30 to do it. That's
5 when everybody should be off of the clock. Then * * * from end of day you
6 go into payroll, and you do end of week, which would add all the hours that
7 you have worked for the week from Sunday through Saturday, at 9:00.

8 And you approve everybody, put my password in to approve all the
9 hours that everybody worked. * * * So I approve everything, and the system
10 tells you that you are about to do end-of-week payroll, you approve everything,
11 and that's it.

12 Q When you get to that point where it's calculating everybody's
13 hours, **at that point is everybody off the clock?**

14 A Yes. Because you need to do the end of day first.

15 Q First?

16 A Correct.

17 Q So you are off the clock, and then you are doing the approval
18 of all of the time things on the computer?

19 A Correct, uh-huh.

20 Q And then after you get all of that done, what do you do?

21 A Close the system.

22 Q Who is in the store at the time you are doing this?

23 A There has to be at least, if not two, one more person besides me.

24 *Powelson Decl.*, Ex. 23 (Sardineta Dep., pp. 32:18 - 34:1) (bold added).

25 A representative comparison of Migis' hourly time records with corresponding store alarm
26 records reveals clearly measurable, off-the-clock time measured between the time he clocked out
(or was clocked out by someone else) of the time-keeping system and the time he activated the
alarm system. *Powelson Decl.*, Ex. 21 (OTC Summary No. 1); Ex. 19 (alarm records); and Ex.
20 (time records). This off-the-clock time usually ranged anywhere from two (2) to seven (7) or
more minutes in each instance.

///

1 According AutoZone policy and practice, there is no question that since Plaintiff Migis
 2 was not clocked in, he was not and would not be paid for the time he started or continued work
 3 for AutoZone's benefit either upon opening or closing the store. Unfortunately, this policy and
 4 practice resulted in several occasions where Migis not only lost straight wages, but also *overtime*
 5 *wages*. *Powelson Decl.*, Ex. 22 (OTC Summary No. 2).

6 This same logic applies for all other hourly AutoZone employees who not only personally
 7 armed or de-activated the store alarm while off the clock, but also fo those hourly employees
 8 present and working at the time of closing. Such individuals are easily identifiable by comparing
 9 their time records with each store's alarm records.⁹

10 **2. Employee Parts Delivery to Other Stores ("Store Transfers") / Travel Time**
 11 **Between Stores**

12 Plaintiff Migis' claim for unpaid wages resulting from off the clock work also arises from
 13 AutoZone's practice of requiring hourly employees to deliver parts (for customers) or otherwise
 14 to travel from one store to another to work, but not paying its employees for travel time.
 15 Consistent with the foregoing deposition testimony that AutoZone's policy and practice is to pay
 16 its hourly employees only for the time they are clocked into the time-keeping system, one
 17 AutoZone Oregon District Manager testified that with respect to an employee who travels
 18 between stores, "As long as the person is on the clock, absolutely, it's paid for." *Powelson Decl.*,
 19 Ex. 8 (Wesner Dep., pp. 52:22 - 53:6).

20 AutoZone required employees (including Plaintiff) to travel between stores to "transfer
 21 parts" or to work at two different stores on the same day. This meant the employee had to: (a)
 22 clock out at the first store when departing, and then (b) clock in at the second store when arriving.
 23 An employee is required to clock in the store at which he arrived, and cannot be clocked in at two
 24

25 ⁹ In response to Plaintiff's discovery request, Defendant objected and refused to produce
 26 one year's worth of alarm records for all Oregon AutoZone stores to compare with corresponding
 employee time records.

different stores simultaneously. See e.g., *Powelson Decl.*, Ex. 8 (Wesner Dep., p. 53:8 - 17 (confirming a change to an hourly employee's time record because the employee had failed to clock out at the first store before departing to the destination store); Ex. 24 (Plaintiff Migis time records); Ex. 25 (Deposition of former AutoZone employee Richard Joarnt, p. 57:9-11: stating "[I] [w]as not paid for the time that I transferred parts from the Hillsboro store to the Newberg store or the Newberg store to the Forest Grove store;" and p. 61:17-21); and Ex. 26 (Deposition of former AutoZone employee Bert Yamaoka, p. 63:23 - 64:12: confirming that an AutoZone store manager required Richard Joarnt to clock out of one store before delivering a part to another AutoZone store; and p. 64:19 - 69:25: confirming his own off-the-clock parts delivery).

Not only could these off the clock transfers occur during the work day, they could also occur before or after an employee's shift. For example, Plaintiff Migis testified:

I would be called at home at 7:30 in the morning [by my Store Manager], for example. I was scheduled to work at 8:00. And it was: "Mike, stop at this store. Pick this up. Can you do that? Bring it in on - on the way to work." Or leaving the store: "Mike, can you drop this off at this location over here? It's over by your house." *Powelson Decl.*, Ex. 15 (Migis Dep., pp. 85:22 - 86:5; and 87:5-12). See also *id.* (Migis Dep., pp. 18:22 - 19:8; 84:17 - 85:19 ("I wasn't on the clock when I was doing it."); and p. 88:11-14).¹⁰

Plaintiff's analysis of other hourly employee time records also reveals that over the course of almost one year, 90 hourly employees clocked in at two different AutoZone stores during the

¹⁰ Plaintiff also testified sometimes he took longer lunches (off the clock) because he was required to transfer merchandise from one store to another. *Powelson Decl.*, Ex. 15 (Migis Dep., p. 153:18-25).

1 same day, resulting in over 15,000 "gap minutes" of unpaid time. *Shubin Decl.*, ¶¶ 9-10; Ex. C.¹¹

2
3 **D. Failure to Pay For Improper Meal Periods (Deducted/Unpaid Wages) (Six Year Claim Period)**

4 Plaintiff's claim for unpaid wages includes the allegation that "AutoZone failed to pay
5 wages to its employees for meal periods of less than 30 minutes in length. As a result, Plaintiff
6 and other similarly situated class members are entitled to wages for the unprovided meal period
7 violations, for the six-year period before the filing of this class action lawsuit * * *." Complaint,
8 ¶ 32.

9 Similarly, Plaintiff alleged on behalf of the class that "For Plaintiff and all similarly
10 situated class members who worked for AutoZone in Oregon, within the six-year period before
11 the filing of this complaint, from whom AutoZone deducted wages from the class members'
12 wages for meal periods of less than 30 minutes in length." Complaint, ¶ 39.

13 Defendant recognizes that Oregon requires a duty-free, unpaid meal period of at least 30
14 minutes for employees who work for six (6) or more hours in a work day. *Powelson Decl.*, Ex.
15 10 ("Meal and Rest Period Requirements"). AutoZone requires its employees to clock out for
16 all meal periods; there are no exceptions to this policy. *Id.*, Ex. 2 (Store Handbook); and Ex. 11
17 (Rogers Dep., p. 76:11-14).

18 Nonetheless, AutoZone practice dictates that if an hourly employee clocks out to take a
19 lunch break but is called back to work and clocks back in before 30 minutes has expired,
20 AutoZone will pay the employee only for the time they are clocked in. *Powelson Decl.*, Ex. 11
21 (Rogers Dep., p. 76:15-23); Ex. 8 (Wesner Dep., p. 77:1-19; pp. 82:18 - 83:3; p. 84:1-12); and
22

23 ¹¹ To the extent Defendant opposes this claim on the grounds that Plaintiff has no way of
24 knowing whether other employees were eventually paid for travel time between stores despite the
25 gap in their time records, Defendant in June 2008 provided a written agreement to produce hourly
26 employee records that would show "hours paid," which Plaintiff could then compare against the
"hours worked" in the SMS time records. However, Defendant later refused to produce those
very same "hours paid" records. Plaintiff therefore filed his *Third Motion for Order Compelling Discovery*, by this reference incorporated herein.

1 Ex. 3 (Bussey Dep., p. 24:3-11).

2 In other words, if an employee clocks out for lunch but is called back to work after 18
3 minutes and clocks in, the employee will only be paid for the remaining 12 minutes of the meal
4 period. *Powelson Decl.*, Ex. 3 (Bussey Dep., p. 24:3-8). There are no exceptions to this policy.
5 *Id.*, Ex. 11 (Rogers Dep., pp. 76:24 - 77:6).

6 Moreover, AutoZone also meticulously tracks its employees' scheduled meal periods by
7 requiring managers to designate a reason each time a meal period is less than the time scheduled,
8 including those that are less than 30 minutes. AutoZone *Powelson Decl.*, Ex. 27; and Ex. 28.

9 For example, AutoZone's "Lunch Variance" and other reports¹² for approximately six
10 months' worth of time reveal there were over 300 instances where an Oregon AutoZone
11 employee received a "Short Lunch." *Powelson Decl.*, Ex. 27. Of those short lunches, AutoZone
12 attributed approximately 64 percent of them to the reason, "Management Change Due to Sales."
13 Another three (3) percent were attributed to "Management Change Due to Cover," and another
14 four (4) percent were associated with "Unexcused [sic] - Did Not Follow Schedule." *Id.* Many
15 of those short lunches were less than 30 minutes, and occurred at nearly if not every Oregon store.
16 *Id.*, Ex. 28 (AutoZone Lunch Variance Report); and Ex. 27.

17 Plaintiff's own analysis of the foregoing reports supports those conclusions. For example,
18 of 256 employees, 115 of them (almost 45 percent) were provided at least one lunch break of less
19 than 30 minutes, resulting in over 3,000 minutes (50 hours) of unpaid time. *Shubin Decl.*, ¶¶ 12 -
20 13; Ex. D.

21 Plaintiff's analysis of one year's worth of hourly employee time records results in a
22 similar conclusion, already confirmed by AutoZone's own managers: AutoZone does not pay
23 employees for meal periods less than 30 minutes. Of the daily time records reviewed for 395
24

25 ¹² Produced as required by Court order, although Defendant produced six (6) months
26 instead of one (1) year's worth of information as the Order required. See also *Shubin Decl.*, ¶ 12,
setting forth in table format the date range.

1 hourly employees, 327 employees had at least one clock out/in gap of less than 30 minutes.
 2 *Shubin Decl.*, ¶ 9. "A gap is defined as a discontinuity in [a daily time record] clock-in/clock-out
 3 sequences within an employee's work day * * *." *Shubin Decl.*, ¶ 9.

4 For those 327 employees there was a total of 5,607 gaps of time less than 30 minutes,
 5 resulting in 114,643 minutes (1,910 hours) of unpaid time. *Shubin Decl.*, ¶¶ 9-10; Ex. A and Ex.
 6 B.

7 Finally, just like those employees, Plaintiff Migis testified he received short meal periods,
 8 *Powelson Decl.*, Ex. 15 (Migis Dep., p. 154:1-21), and his time records show gaps of less than
 9 30 minutes. *Powelson Decl.*, Ex. 29 (Migis time records, Bates Nos. 399, 403).

10 11 IV. POINTS & AUTHORITIES

12 A. Overview

13 Oregon Rule of Civil Procedure 32C requires a court to, as soon as practicable, determine
 14 by order whether and with respect to what claims or issues a class action is to be maintained. See
 15 e.g., ORCP 32C(1) (an order "may be conditional, and may be altered or amended before the
 16 decision on the merits."); and *Joarnt v. Autozone, Inc.*, 343 Or 187, 192 (2008).

17 "The policy at the very core of the class action mechanism is to overcome the problem
 18 that small recoveries do not provide the incentive for any individual to bring a solo action
 19 prosecuting his or her rights." *Vasquez-Lopez v. Ben. Or., Inc.*, 210 Or App 553, 570 (2007)
 20 (citing *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (other internal cites and
 21 quotes omitted)).¹³

22 When determining whether certification is proper, ORCP 32 does not require a
 23 simultaneous adjudication of the case on the merits. In fact, in deciding a motion for class action,
 24

25 ¹³ See also *State ex rel. Nilson v. Cushing*, 253 Or 262, 269 (1969) (in context of ORS
 26 652.150, Court noting that "The smaller the amount of unpaid compensation the greater is
 the need for assistance in effecting collection." (italics original; internal cites omitted)).

1 it is "not appropriate for the court to determine whether plaintiffs are entitled to prevail * * *."
 2 *Alsea Veneer, Inc. v. State of Oregon*, 117 Or App 42, 52-53 (1993) 843 P.2d 492 (1992); *rev'd*
 3 *on other grounds*, 318 Or 33, 862 (1993). The same is true under federal law. See *Eisen v.*
 4 *Carlisle & Jacquelin*, 417 US 156, 177 (1974) ("We find nothing in either the language or history
 5 of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a
 6 suit in order to determine whether it may be maintained as a class action.").

7 Class certification is appropriate for all proposed classes in this case because Plaintiff
 8 meets both the ORCP 32A and ORCP 32B criteria.

9
 10 **B. ORCP 32**

11 ***ORCP 32A Criteria***

12 **1. Numerosity (ORCP 32A(1))**

13 Oregon Rule of Civil Procedure 32A(1) requires the proposed class to be "so numerous
 14 that joinder of all members is impracticable." With regard to numerosity, the Oregon Supreme
 15 Court held that ORCP 32 and FRCP 23 are identical and quotes *Newberg on Class Actions*, 174
 16 (Vol. 1, 1977) for the proposition that "the plaintiff whose class numbers in the 25 to 30 range
 17 should have a reasonable chance of success on the basis of numbers alone." *Newman v. Tualatin*
 18 *Dev. Co. Inc.*, 287 Or 47, 50 (1979).

19 In this case, on April 22, 2008 during the hearing on Defendant's *Motion for Extension*
 20 *of Time*, AutoZone counsel Leigh Ann Tift admitted that this "class is enormous." *Powelson*
 21 *Decl.*, Ex. 31 (p. 6:22-24). Defendant's counsel also later conceded in its June 2008 *Opposition*
 22 *to Plaintiff's Motion to Bind or Compel ORCP 39C(6) Deposition Answers* that AutoZone's
 23 39C(6) testimony "is easily sufficient as a number to establish numerosity." *Opposition* at p. 7:7-
 24 9. See also *Powelson Decl.*, Ex. 9 (39C(6) Dep., pp. 160:1 - 163:25).

25 ///

26 ///

1 **a. *Straight Late Pay Class (Three year class)***

2 Notwithstanding the foregoing, Plaintiff's proposed late pay class meets the numerosity
3 requirement. AutoZone admits in its Answer that for the time period alleged, AutoZone operated
4 at least 24 stores in the State of Oregon. In addition, the much-discussed Excel summary
5 termination report AutoZone produced in this lawsuit demonstrates that at least 158 hourly
6 employees terminated employment with AutoZone in Oregon between November 16, 2006 and
7 November 16, 2007. *Powelson Decl.*, Ex. 12.

8 The Court can therefore infer that if 158 hourly employees terminated in one year, then
9 for this three year class there could be approximately 474 members in the late pay class.¹⁴
10 Numerosity is therefore satisfied.

11 **b. *Off-the-Clock Class (Six year class)***

12 There are two proposed off the clock sub-classes: (i) One for those hourly employees who
13 opened and/or closed the stores in which they worked, which required work either before or after
14 clocking out of AutoZone's time-keeping system; and (ii) another for those employees who
15 AutoZone required to deliver to or pick up merchandise from another store.

16 **i. Store Opening and Closing**

17 Notwithstanding Defendant's admission that the class is enormous, numerosity for the off-
18 -the-clock class is established by means of Defendant's policy for opening and closing the
19 AutoZone stores (i.e., requiring at least two, if not more, employees present at both opening and
20 closing). See also *Migis Decl.*, ¶¶ 3 - 4.

21 Assuming there was at least one hourly employee at opening and closing though there
22
23
24
25

26 ¹⁴ (158 * 3)

were sometimes two or more,¹⁵ and that AutoZone's 22 - 29 stores in Oregon were open to the public at least 360 days a year during the claims period, then the Court can infer that there could be up to 216,000 instances of measurable, off-the-clock violations involving at least 50 employees.¹⁶ There can be no serious dispute over numerosity for this off-the-clock claim.

ii. Store Transfers / Employee Travel Between Stores

Plaintiff's analysis of hourly employee time records show that approximately 90 employees traveled from one AutoZone store to another on the same day, but were not clocked in for the time it may have taken to travel between those stores. *Shubin Decl.*, ¶¶ 9-10; and Ex. C. Numerosity is established.

c. Failure to Pay Class (Deducted Meal Periods) (Six year class)

Despite Defendant's production of only six months' worth of data instead of one year's worth as ordered by the Court, AutoZone's Lunch Variance Report reveals that even for the six months' worth of time, AutoZone deprived 115 employees of a meal period less than 30 minutes.

Moreover, Plaintiff's analysis of one year's worth of Defendant's time records for all employees who worked in the State of Oregon show that approximately 327 employees on at least one occasion received less than 30 minutes for a duty free, uninterrupted meal period.

Numerosity is established for Plaintiff's proposed off the clock class as it relates to meal periods of less than 30 uninterrupted minutes.

d. Derivative Classes

Because Plaintiff seeks to certify his derivative claims for relief under ORCP 32G, he need not show numerosity. See *Shea*, 164 Or App at 205-06.

¹⁵ See *Powelson Decl.*, Ex. 15 (Migis Dep., pp. 71:3 - 72:6: "They [the Store Managers] would do the end-of-day processing while I was still out on a sales floor working, along with any other employees that might have been in the store;" and "I'd go to clock out and find out that I was already clocked out, and -- and we just set the alarm and walked out the door."); and Ex. 23 (Sardineta Dep., pp. 32:18 - 34:1).

¹⁶ [(2 hourly employees) * (2 times per day) * (25 stores) * (360 days) * (6 years)] = 216,000.

1 **2. Commonality (ORCP 32A(2)) and Typicality (ORCP 32A(3))**

2 There is considerable, practical overlap with the elements of commonality, typicality and
3 adequacy of representation. See generally, 5 *Moore's Federal Practice* §§ 23.23[1], 23.24
4 (1997).

5 **a. *Commonality***

6 "Commonality" means there "are questions of law or fact common to the class[.]" ORCP
7 32A(2). However, "[a]ll questions of fact and law need not be common to satisfy the rule. The
8 existence of shared legal issues with divergent factual predicates is sufficient[.]" *Hanlon v.*
9 *Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998). That is, "one significant issue common to
10 the class may be sufficient to warrant certification." *Dukes v. Wal-Mart, Inc.*, 509 F.3d 1168,
11 1178 (9th Cir. 2007).

12 In addition, class relief can be "peculiarly appropriate" when the "issues involved are
13 common to the class as a whole," and which "turn on questions of law applicable in the same
14 manner to each member of the class." *Califano v. Yamasaki*, 442 U.S. 682, 701 (1979).

15 Defendant's counsel has conceded there are common issues of law or fact in this case.
16 For example, in moving to consolidate this case with the *Joarnt v. AutoZone* matter, Defendant
17 argued that both cases covered "the same kinds of wage and hour claims * * *."¹⁷ More recently,
18 in its *Revised Response* to Plaintiff Migis's *Motion for Coordination* with the *Joarnt* case,
19 AutoZone appears to admit that employees in both cases were "subject to the same work practices
20 * * *."¹⁸

21 And as set forth in Plaintiff's Complaint (¶ 47), questions of fact and law common to the

22 _____
23 ¹⁷ See ¶ 2, February 19, 2008 *Declaration of Douglas S. Parker in Support of Defendant's*
24 *Motion to Consolidate*. See e.g., *American Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 227
25 (9th Cir. 1988) ("We * * * hold that statements of fact contained in a brief *may* be considered
26 admissions of the party in the discretion of the district court." (italics original)); and *Whitelock*
v. Wash. County, 2004 U.S. Dist. LEXIS 13610, *15-16 (D.Or. June 16, 2004) (same).

¹⁸ See p. 2:22-23, July 24, 2008 Defendant's *Revised Response to Plaintiff's Motion for Coordination*.

1 entire class include:

- 2 a Whether Plaintiff and class members are subject to Oregon State wage and
3 hour statutes.
- 4 b Whether AutoZone suffered and permitted Plaintiff and overtime class
5 members to work over 40 hours per week.
- 6 c Whether AutoZone failed to pay Plaintiff and overtime class members at the
7 overtime rate for all hours worked over 40 per week.
- 8 d Whether AutoZone suffered and permitted Plaintiff and minimum wage class
9 members to perform work, for which it failed to pay all minimum wages when
10 due.
- 11 e Whether, when an employee's time records reflect that the employee worked a
12 shift of sufficient length to entitle the employee to a meal period under OAR
13 839-020-0050(1)(a), the employee's time records show an uncompensated
14 period of time less than 30 minutes, that period amounts to lost wages from the
15 improper deduction within the meaning of OAR 839-020-0050(1)(a) for which
16 the employee is entitled to pay.
- 17 f Whether Oregon law provides time lines when AutoZone must pay final wages
18 to terminating employees.
- 19 g Whether AutoZone failed to pay Plaintiff and similarly situated class members
20 all wages after termination of their employment when those wages were due.
- 21 h Whether AutoZone's failure to timely pay final wages to Plaintiff and other
22 former employees was willful.
- 23 i Whether Plaintiff and class members are entitled to attorneys' fees under ORS
24 652.200 and/or ORS 653.055.
- 25 j Which remedies are available for the violations of State wage and hour laws.

26 Plaintiff therefore meets the commonality requirement of ORCP 32A(2).

1 **b. Typicality**

2 “Typicality” means that the class representative establish their claims as typical of the
3 claims of the class as a whole. ORCP 32A(3); *Shea*, 164 Or App at 205. In Oregon, typicality
4 is present where the plaintiffs’ claims “**arise[] from the same event or practice or course of**
5 **conduct** that gives rise to the claims of members and his or her claims are based on the same
6 legal theory.” *Newman v. Tualatin Development Co.*, 287 Or. 47, 50 (1979) (cite omitted)
7 (emphasis added).

8 Stated another way, “[t]he ‘common theme’ that [a] [d]efendant has failed to comply with
9 his legal mandates on a systemwide basis * * * is sufficient to support a finding of typicality. As
10 the Third Circuit explained, ‘[a]t any one time, the plaintiffs do not suffer from precisely the same
11 deficiency, but they are all alleged victims of the systemic failures.’” *Xiufang Situ v. Leavitt*, 240
12 F.R.D. 551, 561 (N.D.Cal. 2007) (emphasis added) (cite omitted).

13 And as set forth in Plaintiff’s Complaint (¶ 48), the claims of the named Plaintiff are
14 typical of the claims of the members of the wage and hour class because:

- 15 a. Plaintiff is a member of each class.
- 16 b. Plaintiff’s claims stem from the same practice or course of conduct that forms
17 the basis of each class.
- 18 c. Plaintiff’s claims are based upon the same legal and remedial theories as those
19 of the class and involve similar factual circumstances.
- 20 d. There is no antagonism between the interests of the named Plaintiff and
21 putative, absent class members.
- 22 e. The injuries which Plaintiff suffered are similar to the injuries that class
23 members have suffered.

24 Typicality is therefore present in this case.

25 ///

26 ///

1 **3. Adequacy of Class Representative (ORCP 32A(4))**

2 Oregon Rule of Civil Procedure 32A(4) requires that the class representatives must fairly
3 and adequately protect the interests of the class. The crucial components of this element concern
4 the lack of conflicts between the class representative and the class as a whole, and the
5 competency of counsel. *Alsea Veneer, Inc. v. State of Oregon*, 117 Or App 42, 53 (1992). *rev'd*
6 *on other grounds*, 318 Or 33, 41 (1993).

7 ***a. Class Representative***

8 “It is often the defendant, preferring not to be successfully sued by anyone, who
9 supposedly undertakes to assist the court in determining whether a putative class should be
10 certified. When it comes, for instance, to determining whether ‘the representative parties will
11 fairly and adequately protect the interests of the class,’ * * * it is a bit like permitting a fox,
12 although with a pious countenance, to take charge of the chicken house.” *Eggleston v. Chicago*
13 *Journeyman Plumbers’ Local Union No. 130*, 657 F.2d 890, 895 (7th Cir. 1981).

14 In sum, the fundamental premise for being an adequate class representative is to “be part
15 of the class and possess the same interest and suffer the same injury as the class members.” *East*
16 *Texas Motor Freight v. Rodriguez*, 431 U.S. 395, 403 (1977) (quotes omitted) (in context of
17 Fed.R.Civ.Pro. 23(a)(4)).

18 When asked during a May 15, 2008 ORCP 39C(6) deposition why AutoZone believed
19 Plaintiff Migis was an inadequate class representative, *the only reason* the AutoZone designee
20 gave was that Mr. Migis had not worked for AutoZone during the entire claims period. *Powelson*
21 *Decl.*, Ex. 9 (May 15, 2008 ORCP 39C(6) Dep., pp. 22:14-20; 24:8-15).

22 No conflict exists between the named Plaintiff and the rest of the class. Plaintiff will
23 therefore also fairly and adequately represents and protects the interests of the classes because:
24 (1) he alleges suffering the same injuries as the rest of the class members; (2) as Defendant
25 conceded in its earlier motions, the legal arguments for remedying those injuries are common for
26 the entire class; and (3) Plaintiff and the putative class members were subject to the same

1 company policies and work practices.

2 *b. Adequacy of Class Counsel*

3 Plaintiff has also retained adequate class counsel. The second component is the adequacy
4 of counsel. The law firm of Bailey Pinney & Associates ("Bailey Pinney"), retained by Plaintiff
5 to prosecute this case, limit their practice to wage and hour litigation and wage and hour class
6 action litigation.¹⁹ See *Pinney Decl. The Declaration of J. Dana Pinney* lists the extensive
7 Appellate decisions on wage and hour issues obtained by the Bailey Pinney firm in the Court of
8 Appeals and Supreme Court of this state.

9 The Court can also look to the hearings which have occurred before in this case to find
10 that Plaintiff's attorneys are competent to handle the litigation. Further, the fact that Bailey
11 Pinney continues to prosecute the case aggressively even after more than a year of litigation is
12 evidence that Bailey Pinney will see this case through. This fact is also shown by the significant
13 number of Appellate cases on wage and hour laws prosecuted by the Bailey Pinney firm. *Pinney*
14 *Decl.* ¶¶ 6 - 11.

15 Based on the foregoing, Plaintiff satisfies Rule 32A(4).

16
17 *ORCP 32B: Superiority of the Class Action Mechanism*

18 In addition to the requirements of ORCP 32A, Rule 32B requires the Court also find that
19 a class action is "superior to other available methods for the fair and efficient adjudication of the
20 controversy." In 1992, ORCP 32B was amended to remove the requirement that common
21 questions of law or fact predominate over any questions only affecting individual class members.
22 See *Shea*, 164 Or App at 207.

23 Thus, a party seeking class certification need only demonstrate that one of the ORCP 32B
24 factors has been met. *Shea*, 164 Or App at 207 (Court stating that Rule 32B "includes the

25
26 ¹⁹Bailey Pinney & Associates has been retained on non-wage and hour work, but such work is a rare exception with the bulk of the cases brought asserting wage claims.

1 predominance of common questions of law and fact as a 'pertinent' matter that the trial court
2 must consider. It does not require predominance as a *sine qua non* of certification of any class.”).

3 Rule 32B lists eight “pertinent” matters to the finding of class action superiority,
4 including: (1) the extent to which “questions of law or fact common to the members of the class
5 predominate over any questions affecting only individual members” (ORCP 32B(3)); (2) whether
6 individual class members have little interest in controlling the prosecution of the case (ORCP
7 32B(4)); (3) the desirability or undesirability of concentrating litigation of the claims in the
8 particular forum (ORCP 32B(6)); and (4) manageability of the action as a class (ORCP 32B(7)).

9 In this case, Defendant has virtually conceded there are common issues of law or fact, and
10 that its employees in this and the *Joarnt* case were subject to the same work practices.

11 Based on these admissions, as well as the foregoing analysis and underlying evidence
12 supporting Plaintiff’s proposed classes, common issues of law and fact pre-dominate over any
13 individual questions affecting only individual class members.

14 ORCP 32B(4) involves the “interest of members of the class in individually controlling
15 the prosecution” of the case. The United States Supreme Court explained this concept in
16 *Amchem Products, Inc. v. Windsor*:

17 In setting out these factors, the Advisory Committee for the 1966 reform
18 [of Fed.R.Civ.Pro. 23] anticipated that in each case, courts would
19 “consider the interests of individual members of the class in controlling
20 their own litigations and carrying them on as they see fit.” They
21 elaborated: “[. . .] the class may have a high degree of cohesion and
22 prosecution of the action through representatives would be quite
23 unobjectionable, or the amounts at stake for individuals may be so small
24 that separate suits would be impracticable.”

25 521 U.S. 591, 616 (1997) (cites omitted). The *Amchem* Court further noted that:

26 While the text of Rule 23(b)(3) does not exclude from certification cases

1 in which individual damages run high, the Advisory Committee had
 2 dominantly in mind vindication of "the rights of groups of people who
 3 individually would be without effective strength to bring their opponents
 4 into court at all."

5 521 U.S. at 617 (cite omitted).

6 There is very little reason for any single class member to want to control the prosecution
 7 of this case. This ORCP 32B factor weighs in favor of class certification.

8 Finally, Plaintiff proposes classes that also manageable, and the adjudication of which will
 9 further judicial economy. For the Court to process and hear separately each individual putative
 10 class member's case would be an incredibly inefficient use of judicial resources. Combining
 11 numerous, smaller wage clam cases into a single class action is judicially efficient and presents
 12 fewer management difficulties:

13 This is especially so since Defendant's own documents and representative testimony will
 14 likely be all that is necessary for proper adjudication. That is, Defendant's policies and practices
 15 are well-established and acknowledged, and the nature and extent of liability and damages are
 16 easily ascertainable from AutoZone's documents. See e.g., *Anderson v. Mt. Clemens Pottery Co.*,
 17 328 U.S. 682 (1946) (supporting the notion that a court can review representative evidence to
 18 determine the number of hours employees worked).

19 Based on the foregoing, one or more ORCP 32B factors are met; class certification is
 20 appropriate.

21 22 **C. ORCP 32H**

23 ORCP 32A(5) requires that the class representative, in an action for damages, provide
 24 notice to Defendant. This notice must conform to ORCP 32H, which states:

25 H(1) Thirty days or more prior to the commencement of an action for damages
 26 pursuant to the provisions of sections A and B of this rule, the potential plaintiffs'
 class representative shall:

1 (H)1(a) Notify the potential defendant of the particular alleged cause of action;
2 and

3 H(1)(b) Demand that such person correct or rectify the alleged wrong.

4 Plaintiff provided Defendant AutoZone the required notice. See *Pinney Decl.*, Ex. 1.
5 Plaintiff sent this notice on or about March 28, 2007, and then commenced this action on
6 November 16, 2007.

7
8 **V. CONCLUSION**

9 Based on the foregoing, Plaintiff Migis requests the Court certify this matter as a class
10 action for all proposed classes and sub-classes.

11 Signed this 15th day of August 2008.

12
13 BAILEY, PINNEY & ASSOCIATES, LLC

14 

15 A.E. "BUD" BAILEY, OSB 87157
16 CHEY POWELSON, OSB 03551
17 SHARON COUSINEAU, OSB 011637
18 Of Attorneys for Plaintiff
19
20
21
22
23
24
25
26

CERTIFICATE OF SERVICE

I hereby certify that I caused to be served the foregoing **Plaintiff Migis' Motion for ORCP 32C Class Action Certification** upon:

Ms. Leigh Ann Tift
Littler Mendelson
One Union Square, 600 University St, Ste 3200
Seattle, WA 98101

by the following indicated method or methods:

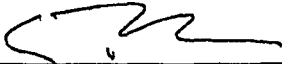
☒ by **mailing** a full, true, and correct copy thereof in a sealed, first-class postage-prepaid envelope, addressed to the person as shown above, the last-known office address of the person, and deposited with the United States Postal Service at Vancouver, Washington on August 15, 2008.

and also upon

Ms. Amy Alpern
Littler Mendelson
1750 SW Harbor Way Suite 450
Portland, OR 97201

☒ by causing a full, true, and correct copy thereof to be **hand-delivered** to the person listed above on August 15, 2008.

DATED: August 15, 2008



CHEY POWELSON, OSB 035512
Of Attorneys for Plaintiff

1
2
3
4 **IN THE CIRCUIT COURT OF THE STATE OF OREGON**
5 **FOR THE COUNTY OF MULTNOMAH.**
6

7 **MICHAEL MIGIS**, individually, and on
8 behalf of all other persons similarly situated,

9 Plaintiff,

10 v.

11 **AUTOZONE, INC.**, a foreign corporation,

12 Defendant.

No. 0711-13531

**DECLARATION OF GEORGE
SHUBIN**

13 I, George Shubin, hereby declare:

14 1. I am an independent computer consultant with nearly 40 years of experience in the use
15 and programming of computer systems. I provide database design and programming services
16 for clients who need specialized databases created and software applications designed to
17 access and analyze those databases. I have worked in many aspects of Information
18 Technology, first as a mainframe operator then through various levels of increasing
19 responsibility. I have been employed in computer operations, systems analysis and
20 programming, database design, and information technology management. I have been an
21 independent computer consultant since 1991. I have developed database programs for many
22 different applications, and have resolved many complex data problems over the course of my
23 career.

24 2. I have personal knowledge of the facts set forth below and, if called upon as a witness,
25 I could and would competently testify thereto.
26

1 3. I was hired by Bailey Pinney & Associates, LLC, to perform data conversion, database
2 construction, and analysis of certain documents that were provided to me by Bailey Pinney &
3 Associates. I received two sets of documents from Bailey Pinney & Associates.

4 4. The first set of documents came on a CD-ROM disk, identified as "AZ Payroll Nov
5 2006 - Nov 2007". I was informed that the CD was provided by Autozone, Inc. The
6 documents were referred to as "SMS Data", and were contained within a proprietary database
7 that protected the data from being changed. Included on the same CD was a database viewer
8 program called "IBM OnDemand", which permitted the viewing and exportation of the data. I
9 was requested by Bailey Pinney & Associates to process those documents and construct a
10 database, perform certain analyses, and generate reports of the data.

11 5. The second set of documents came in the form of an Excel spreadsheet file, named
12 "AZ_Migis 2221 - Lunch Variance Report.xls". I was informed that the file was provided by
13 Autozone, Inc. The documents were referred to as "Lunch Data". I was requested by Bailey
14 Pinney & Associates to process those documents and construct a database, perform certain
15 analyses, and generate reports of the data.

16 6. Paragraphs 7 through 10 below refer to my processing the SMS Data. Paragraphs 11
17 through 13 refer to my processing the Lunch Data.

18 ***Processing the SMS Data***

19 7. Using the text export facility in the IBM OnDemand program, I converted all 9,454
20 document pages into 9,454 corresponding text files, each line of text in each text file exactly
21 matching each line of text in each document page in the database. The title on each page of
22 these documents was named "SMS TIME FINAL HISTORICAL REPORT". The documents
23 were a record of time clock punch-in and punch-out information. Each of the 9,454 pages
24 contained one employee's time clock activity for one day. I then used Microsoft Access'
25 import tool to import all 9,454 text files into an Access database.

26 8. After importing the SMS Data into a Microsoft Access database, I used

1 industry-standard database data manipulation commands to reformat the imported raw text
 2 into a form that was useable in calculations. Once each line of text was parsed into selected
 3 fields such as employee name, date worked, clock-in time, etc., I analyzed the data to produce
 4 some reports.

5 9. The following chart summarizes my findings from the 75,752 lines of data that was
 6 derived from the 9,454 document pages produced.

Dates represented	10/29/2006 to 11/27/2007
Total number of unique employees	395
Employees with gaps of 29 minutes or less	327
Number of gaps of 29 minutes or less	5,607
Number of gap minutes 29 minutes or less	114,643
Employees with gaps between work locations	90
Number of gap minutes between work locations	15,954

7
 8
 9
 10
 11
 12 A gap is defined as a discontinuity in the SMS Data clock-in/clock-out sequences within an
 13 employee's work day, i.e. the time clock record is silent between a previous clock-out time
 14 and a subsequent clock-in time within an employee's work day.

15 10. Further details of my findings in the SMS Data may be found in the attached Exhibits
 16 A, B and C. Exhibit A shows summary counts of the data sorted by employee last name.
 17 Exhibit B is a detailed list, sorted by employee name and work day date, showing each
 18 occurrence of a gap that is 29 minutes or less, and the date of the occurrence, for each
 19 employee. Exhibit C is a detailed list of employees who clocked-out at one store location and
 20 then clocked-in at another store location on the same day, and who had a gap of any size up
 21 to 240 minutes (4 hours) between locations. Exhibit C shows each occurrence and the size of
 22 the gap.

23 *Processing the Lunch Data*

24 11. Using Microsoft Access' Excel data import feature, I imported the Lunch Data into an
 25 Access database. The data was tabular in format, so it required only minimal reformatting to
 26 get it into a form that was useable for calculations.

12. The following chart summarizes my findings from the 2,198 lines of data that was derived from the Lunch Data spreadsheet file.

Dates represented in the data	1/1/2006 to 8/31/2006
Dates not represented in the data	All March and April 2006 are missing
Total number of unique employees	256
Employees with lunch breaks 29 minutes or less	115
Number of lunch breaks of 29 minutes or less	319
Number of lunch minutes "lost"	3,079

A "lost" minute is defined as the number of minutes difference between a full 30-minute lunch break and the actual time recorded for the lunch break.

13. A detailed list of lunches that were less 29 minutes or less, and the date of their occurrence, sorted by employee name, is contained in the attached Exhibit D.

I HEREBY DECLARE THAT THE ABOVE STATEMENT IS TRUE TO THE BEST OF MY KNOWLEDGE AND BELIEF, AND THAT I UNDERSTAND IT IS MADE FOR USE AS EVIDENCE IN COURT AND IS SUBJECT TO PENALTY FOR PERJURY.

Dated August 15, 2008 at

Vancouver, WA



GEORGE SHUBIN

AutoZone-Migis SMS Data Incident Summary of Gaps of 29 Minutes or Less, Sorted By Employee Last Name

Dates represented: 10/28/2006 through 10/27/2007

Unpaid			Unpaid		
Employee	Incidents	Minutes	Employee	Incidents	Minutes
1 ABBOTT, RYAN	3	62	62 CORONA, CARLOS	4	82
2 ACFALLE, JEREMIAH	3	82	63 CORTEZ VIRGEN, RUBEN	2	26
3 AGUIAR, LUIS	16	132	64 CORTEZ, JOSEPH	3	80
4 ALANIS, SHANNON	12	280	65 COTA, OSCAR	23	236
5 ALLAIRE, ERIC	4	30	66 COTE, WRAY	16	352
6 ALONSO, ROSA LINDA	8	225	67 COTTENHAM, HONEY	77	1,764
7 ALVARADO, ARTURO	5	132	68 CRAWFORD, JERRY	5	93
8 AMARAL, JORGE	8	75	69 CRUZ, ERIC	1	21
9 AMON, CHRISTOPHER	1	24	70 CUFAUDE, PETER	1	1
10 ANAND, DAVE	10	267	71 CURTIS, KRISTOPHER	4	84
11 ANDERSON, ANTHONY	4	74	72 DAVIS, JAMES	11	260
12 ANDERSON, BRETT	6	154	73 DAVIS, WILLIE	20	347
13 ANDRADE, ABRAHAM	3	37	74 DOYLE, CARMEN	1	29
14 ANGELES, PABLO	15	383	75 DUNCAN, SHAWN	1	28
15 ANGIANO, ALFREDO	9	117	76 DUNCANS, JAMES	4	105
16 ASTORGA, ERIBERTO	30	550	77 EATON, TREVOR	38	655
17 ATCHISON, KRISTOPHER	13	273	78 ECHEVERRIA, ANDRES	3	9
18 AVALOS, CESAR	10	244	79 ECKHART, DANIEL	20	161
19 BARBER, CURTIS	26	580	80 EDEN, JESSICA	28	517
20 BARLOW, JAMES	2	57	81 ELKINS, DAVID	11	234
21 BARLOW, KRISTINE	25	322	82 ELLEFSON, ASHLEE	1	28
22 BARNHART, JAIMEE	8	96	83 ELLIS, SHAWN MICHEAL	14	274
23 BATHKE, STEVEN	12	190	84 ELLSON, WENDY M	9	188
24 BAUTISTA, FRANCISCO	7	128	85 ENSOR, CHET	6	146
25 BECHTEL, SEAN	4	68	86 ERICKS, MEGAN	3	31
26 BELKNAP, ROBERT	7	174	87 ESLAMIZAR, DAVID	1	2
27 BENTLEY, DEWAYNE	4	12	88 ESPINOZA, REYNALDO	36	521
28 BERNINGHAUSEN, JOSEPH	15	370	89 ESTRADA, JAIME	115	1,864
29 BEST, GARY	11	204	90 FANGUY, MINDY	22	614
30 BISSONETTE II, EDWARD	17	189	91 FARLEY, JOSEPH	54	898
31 BLAGG, LUCAS	19	312	92 FELTY, STEVEN	3	81
32 BOATMAN, BYRON	75	1,750	93 FERNANDEZ, REGINALDO	9	158
33 BOND, JASON	2	30	94 FIELDHOUSE, KELLI	12	299
34 BOQUET, DARYL	5	128	95 FIRTH, STEVEN	7	95
35 BROKAW, THOMAS	35	594	96 FISHER, MICHAEL	16	298
36 BROWN, MIKE	37	659	97 FLORES, JAVIER OSCAMPO	4	34
37 BROWN, SCOTT	34	577	98 FLORES, JOSE	32	737
38 BROWNE, AARON	41	1,073	99 FLORES, JOSHUA	15	311
39 BRYANT, CHRIS	2	35	100 FOSTER, MICHAEL	4	101
40 BURGH, DARYL	2	55	101 GARCIA, DANIEL	50	1,144
41 BURK, STEVEN	2	53	102 GEFROH, JOSEPH	67	1,023
42 BURTON, DANIEL	12	276	103 GILLESPIE, HEATHER	20	366
43 CAMPBELL, SCOTT	14	264	104 GOMEZ, PAUL	29	334
44 CARLSTON, JARED	2	35	105 GONZALEZ GUERRER, FIDEL	6	111
45 CARPENTER, TYLER	2	3	106 GONZALEZ RAMOS, HERIBERTO	5	49
46 CARRILLO, VERONICA	5	136	107 GONZALEZ, CIRIACO	5	105
47 CARSON, PETER	5	135	108 GONZALEZ, SANTIAGO	9	181
48 CARTER, HENRY	22	493	109 GRAHAM, BRIAN	94	2,275
49 CASTRO, PHILLIP	21	470	110 GREENSTADT, CJ	18	349
50 CAVETT, TIMOTHY	44	1,108	111 GRIGGS, COREY	2	35
51 CEBREROS, JUAN	17	242	112 GRUENDING, MATTHEW	1	22
52 CHITTY, EVA	40	944	113 GUDINO, STEPHANIE	7	152
53 CLEARY, JASON	8	202	114 GULOVSEN, CRYSTAL	46	771
54 CLEVINGER, DUSTIN	47	810	115 GUTTRIDGE, THOMAS	4	59
55 CLEYS, BRIAN	2	47	116 GUZMAN, ANDRES	11	285
56 COFFMAN, JASSON	10	87	117 HA, ALAN	19	454
57 COLE, CONRAD	15	110	118 HAAGENSON, TRACY	4	89
58 COLLIER, TRAVIS	5	82	119 HAINES, RYAN	29	651
59 COLVARD, CHERYL	111	2,430	120 HALL, CHARLEY	14	133
60 COMSTOCK, MARC	19	317	121 HANCOCK, LANCE	14	350
61 CONRAD, GABRIEL	6	124	122 HANDY, RYAN	1	2

AutoZone-Migis SMS Data Incident Summary of Gaps of 29 Minutes or Less, Sorted By Employee Last Name

Dates represented: 10/28/2006 through 10/27/2007

Employee	Incidents	Unpaid Minutes	Employee	Incidents	Unpaid Minutes
123 HARBOUR, STACIE	5	76	184 MORALES, MARIO	14	290
124 HARRIS, LEANNA	9	92	185 MORAVEK, AARON	3	54
125 HASKELL, JANELLE	15	76	186 MORRILL, BRYAN	18	430
126 HAYASHI, PATRICK	14	210	187 MORRIS, DAVID	12	245
127 HEBERT, RYAN	1	3	188 MORRIS, IAN	3	86
128 HENDRICKS, ALAN	4	29	189 MUNOZ ESCOBEDO, FERNANDO	7	151
129 HINDLE, ANTHONY	16	235	190 NACOSTE, ANTHONY	40	976
130 HOBSON JR, LEO	7	16	191 NARVAEZ, DANIEL	5	138
131 HOGAN, MARK	4	87	192 NIELSEN, MARK	19	488
132 HOLLAND, JOHN	11	117	193 NIMTZ, ALISON	19	461
133 HOLMES, AUSTIN	18	372	194 NINO ORTIZ, RICARDO	1	27
134 HOUSH, CHRISTOPHER	3	35	195 NORTH CUTT, JUSTIN	8	144
135 HUGHES, DAMON	58	1,341	196 NUNEZ, ADRIAN	1	5
136 HUMPHREY, JEREMIAH A	14	389	197 OCHOA, JOSE	1	28
137 HUNT, JOHN	56	1,250	198 ORDEX, NIGEL	20	490
138 IRWIN, KENNETH	2	2	199 ORFIELD, JUSTIN	23	503
139 JACK, RACHEL	16	179	200 ORNDUFF, CHRISTOPHER	25	468
140 JAQUEZ, JOSE	17	353	201 ORNELAS, SCOTT	5	132
141 JENSEN, JUSTIN	8	196	202 OSHEA, DANIEL	25	543
142 JENSEN, TRACI	4	109	203 OTT, ANDREW	9	244
143 JOHNSON, ANGELA	8	68	204 OUELLETTE, ANDREW	1	29
144 JONES, JOHN	15	344	205 PADGETT, WALTER	8	87
145 JONES, ROBERT	7	157	206 PAREDES, LEO	1	5
146 KELLEY, DONALD	6	166	207 PARMETER, MELISSA	3	86
147 KEY, ROBERT	8	100	208 PARNELL, REX	1	26
148 KLEIN, SCOTT	65	1,454	209 PARRA, MAGDALENA NAVARRO	31	644
149 KNIERIM, ANTHONY	3	69	210 PAZ, FILBERTO	27	488
150 KOLODY, MICHAEL	3	58	211 PERMIN, JOSHUA	4	85
151 KREBS, ANDREW	31	565	212 PERSONS, KIMBERLY	18	339
152 LAHAIE, JACQUELINE	6	74	213 PETROSYAN, EDGAR	9	200
153 LAIRD, DIXON	3	52	214 PETTY, TIMOTHY	5	32
154 LANE, DAVID	14	195	215 PHILBROOK, ANTHONY	7	83
155 LANE, GARY	29	770	216 PHILLIPS III, CYRENIUS	6	145
156 LANE, JEFF	16	268	217 PHILLIPS, ORION	1	29
157 LARSEN, HEATHER	14	190	218 PHILLIPSON, JUSTIN	1	28
158 LARSEN, RICHARD	1	4	219 PINKSTON, STEVEN	33	871
159 LARSON, RYAN	9	187	220 PITTS, ERIC	7	93
160 LASETER, ERIC	12	120	221 PLANALP, JESSICA	2	6
161 LAY IV, WILLIAM	1	28	222 PRADO, YGNACIO	2	51
162 LEACH, JOE	5	111	223 PROEBSTEL, DARIN	20	428
163 LEON, JAIME	1	13	224 RAMIREZ, CHRISTINA	1	1
164 LINDQUIST, SANDIE	8	126	225 RAMIREZ, JOSE	9	195
165 LOGAN, JAMI	3	25	226 RAMIREZ, ROBERTO	9	130
166 LOOMIS, ROBERT	132	3,230	227 RATLIFF, HEIDI	5	37
167 LUNOW, MARCUS	2	44	228 RAUCH, JAMES	15	244
168 LUTJE, ELIJAH	7	179	229 RAY, RANDALL	3	86
169 LYSKO, BORIS	10	267	230 REAM SAPIANO, ALEX	12	148
170 MADRIGAL, MARIA	24	481	231 REYES, JOSE	1	15
171 MALONI, KELSEE	2	29	232 REYES, MARTIN	17	69
172 MARISCAL, RIGOBERTO	1	27	233 RICHARDSON, MARTIN	37	892
173 MARSH, BRYAN	34	786	234 RICHMOND, JEFFREY	33	732
174 MARTINEZ, ARMANDO	1	1	235 RICKELS, DAVID	13	290
175 MARTINEZ, JOSE	16	363	236 RINCON, MIGUEL	81	2,003
176 MCALARY, ALREN	9	79	237 RITTER, BRYCE	35	639
177 MCCOLM, SKLER	2	44	238 RIVERA, RARAMURI	47	969
178 MCSORLEY, MISTY	45	1,039	239 ROBERTS, SANDRA	12	16
179 MEHIC, MIRZET	47	970	240 ROBINSON, NICK	4	22
180 MENDOZA, ALEJANDRO	9	51	241 ROBINSON, SHAWN	44	843
181 MILLER, NICK	12	110	242 ROCK, NICHOLAS	4	85
182 MILLER, PHILLIP	14	304	243 RODRIGUEZ, JAVIER	2	55
183 MITCHELL, LAWRENCE	1	5	244 RODRIGUEZ, JOSE	18	457

AutoZone-Migis SMS Data Incident Summary of Gaps of 29 Minutes or Less, Sorted By Employee Last Name

Dates represented: 10/28/2006 through 10/27/2007

Employee	Incidents	Unpaid Minutes	Employee	Incidents	Unpaid Minutes
245 RODRIGUEZ, VICTOR	41	877	306 WARREN, ASHLEY JO	6	102
246 RUELAS, ARTURO	44	658	307 WATSON, ROBERT	4	105
247 RUND, JOSHUA	2	48	308 WEAVER, MATTHEW	2	55
248 RUTH, DANIEL	42	1,073	309 WEBER, ANDREW	43	938
249 SAENZ, ADAM	10	71	310 WEBER, NATHANIEL	2	27
250 SANCHEZ, BRENDA	1	27	311 WESNER, KIRSTIN	8	218
251 SANDOVAL, SAUL	11	59	312 WEST, ISAIAH	5	58
252 SANTIAGO, RICARDO	2	29	313 WESTCOTT, ROBERT	5	107
253 SCHELLER, JOSEPH	21	513	314 WHITTECAR, JON	8	215
254 SCHMIDT, ALEXANDER	1	28	315 WILLCOX, SEAN	16	203
255 SCHOW, CHARLES	4	103	316 WILLIAMS, DREW	30	560
256 SCHUMACHER, COLTEN	27	650	317 WILSON, NICK	14	337
257 SELLS, MICHAEL	4	58	318 WINES, TROY	111	2,901
258 SENINA, IVAN	62	1,363	319 WISE, TROY	9	143
259 SHAFFER, ROBERT	5	135	320 WOLFE, MICKEY	46	1,154
260 SHAW, MICHAEL	1	28	321 WOOD, TODD	11	242
261 SHOUPPE, MIKE	4	105	322 YORK, DON	6	100
262 SIERRA, JOSE	1	2	323 YOU, SOLHENA	2	5
263 SIGALA, THOMAS	4	114	324 ZACARIAS, SALVADOR	5	67
264 SINNOTT, MARTIN	11	268	325 ZANDER, GEFF	3	33
265 SIX, JOHN	57	1,206	326 ZAPIEN, EDGARDO	3	74
266 SMITH, JAMES	24	588	327 ZIMMERMAN, MICHAEL	7	126
267 SMITH, JONATHAN	1	28			
268 SOLBERG, JACOB	18	132			
269 SPEGEL, KRISTA	3	45			
270 STEBBINS, ROBERT	18	149			
271 STEENBURGH, GLEN	12	40			
272 STONE, MATHEW	3	84			
273 STONER, MATTHEW	70	1,863			
274 STRICKLIN, DUANE	9	107			
275 STULL, CHARLES	1	5			
276 STUTZ, KACEY	8	123			
277 SWINEHART, KOB	3	29			
278 SWORDEN, JOSEPH	15	322			
279 TAGLE, RICARDO	9	32			
280 TANK, JUSTIN	84	1,556			
281 TEET, JAMES	200	5,666			
282 TERZIAN, MICHAEL	112	1,956			
283 THELEN, ANA	19	402			
284 THIELEN, KATERI	13	371			
285 THORNTON, KURT	19	460			
286 TOLUTAU, ITENI	9	104			
287 TOMPKINS, JASON	95	2,174			
288 TORRERO, JHONATHAN	3	45			
289 TORRES, ENRRIQUE	4	86			
290 TORRES-MORA, MARIO	1	1			
291 TOTTEN, RYAN	33	624			
292 TRAVER, RAYMOND	9	105			
293 TREJO, ABRAHAM	1	3			
294 TRIPP, JEFFERY	3	86			
295 TURNER, CLENTON	9	233			
296 VALADEZ, RICARDO	7	70			
297 VALDOVINOS, OSCAR	1	29			
298 VALENCIA, RAY	3	57			
299 VAZQUEZ, NOE	10	258			
300 VEGOS, JESSE	10	198			
301 VILLASTRIGO, FRANCISCO	14	252			
302 VOZNYUK, YAROSLAV	224	5,155			
303 WALLER, SHAWN	11	242			
304 WALLS, DANJA	2	55			
305 WARDWELL, MELISSA	1	1			

AutoZone-Migis SMS Data Incident Summary of Gaps of 29 Minutes or Less, Sorted By Employee Last Name

Dates represented: 10/28/2006 through 10/27/2007

Employee	Incidents	Unpaid Minutes	Employee	Incidents	Unpaid Minutes
Report Total	5,607	114,643			

AutoZone-Migis SMS Data Gaps of 29 Minutes or Less, Sorted By Employee and Date of Occurrence

Dates Represented: 10/29/2006 through 10/27/2007

Employee	Date	Start Time	End Time	Unpaid Minutes	Employee	Date	Start Time	End Time	Unpaid Minutes
ABBOTT, RYAN	10/17/2007	1:10 PM	1:38 PM	28	ALVARADO, ARTURO	9/29/2007	5:00 PM	5:28 PM	28
	8/12/2007	3:35 PM	3:58 PM	23		4/19/2007	6:01 PM	6:30 PM	29
	9/2/2007	2:23 PM	2:34 PM	11		5/1/2007	11:19 AM	11:40 AM	21
				62					132
ACFALLE, JEREMIAH	3/23/2007	4:43 PM	5:12 PM	29	AMARAL, JORGE	11/7/2006	5:44 PM	5:49 PM	5
	7/5/2007	4:32 PM	5:00 PM	28		11/7/2006	5:51 PM	5:56 PM	5
	8/11/2007	6:06 PM	6:31 PM	25		12/3/2006	8:50 AM	8:51 AM	1
				82		11/3/2006	3:04 PM	3:11 PM	7
AGUIAR, LUIS	11/17/2006					11/17/2006	4:12 PM	4:30 PM	18
	9/19/2007	8:04 AM	8:19 AM	15		11/8/2006	2:34 PM	2:35 PM	1
	9/3/2007	1:30 PM	1:32 PM	2		11/1/2006	3:40 PM	4:09 PM	29
	8/25/2007	3:24 PM	3:27 PM	3		11/2/2006	5:07 PM	5:16 PM	9
	8/17/2007	1:33 PM	1:45 PM	12					75
	8/2/2007	12:18 PM	12:26 PM	8	AMON, CHRISTOPHER				
	2/19/2007	3:57 PM	3:59 PM	2		9/4/2007	2:28 PM	2:52 PM	24
	10/25/2007	3:21 PM	3:34 PM	13					24
	2/13/2007	1:07 PM	1:10 PM	3	ANAND, DAVE				
	7/12/2007	1:50 PM	2:03 PM	13		7/2/2007	3:18 PM	3:45 PM	27
	3/23/2007	8:01 AM	8:02 AM	1		7/31/2007	2:56 PM	3:22 PM	26
	4/6/2007	2:40 PM	2:46 PM	6		7/30/2007	3:52 PM	4:21 PM	29
	4/20/2007	2:45 PM	2:52 PM	7		7/24/2007	2:49 PM	3:14 PM	25
	5/16/2007	2:37 PM	2:40 PM	3		7/20/2007	2:44 PM	3:11 PM	27
	5/31/2007	2:18 PM	2:33 PM	15		7/18/2007	12:54 PM	1:22 PM	28
	6/10/2007	4:36 PM	4:37 PM	1		7/17/2007	3:15 PM	3:39 PM	24
	7/11/2007	12:51 PM	1:19 PM	28		7/16/2007	3:54 PM	4:19 PM	25
				132		7/10/2007	4:51 PM	5:18 PM	27
ALANIS, SHANNON						8/1/2007	12:46 PM	1:15 PM	29
	12/20/2006	8:33 PM	8:34 PM	1					267
	12/26/2006	3:36 PM	3:58 PM	22	ANDERSON, ANTHONY				
	10/23/2007	5:06 PM	5:31 PM	25		1/1/2007	4:01 PM	4:29 PM	28
	10/22/2007	5:03 PM	5:30 PM	27		1/28/2007	2:34 PM	2:57 PM	23
	10/13/2007	3:35 PM	4:00 PM	25		2/16/2007	5:01 PM	5:22 PM	21
	8/2/2007	3:24 PM	3:43 PM	19		2/26/2007	4:57 PM	4:59 PM	2
	6/11/2007	4:29 PM	4:58 PM	29					74
	4/8/2007	1:34 PM	2:00 PM	26	ANDERSON, BRETT				
	3/31/2007	4:02 PM	4:29 PM	27		11/20/2006	1:11 PM	1:35 PM	24
	1/26/2007	5:02 PM	5:25 PM	23		11/6/2006	1:46 PM	2:14 PM	28
	10/25/2007	4:23 PM	4:51 PM	28		12/23/2006	2:49 PM	3:16 PM	27
	3/4/2007	1:05 PM	1:33 PM	28		11/18/2006	12:11 PM	12:35 PM	24
				280		12/20/2006	3:31 PM	3:57 PM	26
ALLAIRE, ERIC						12/4/2006	2:37 PM	3:02 PM	25
	11/17/2006	4:19 PM	4:20 PM	1					154
	12/31/2006	3:12 PM	3:14 PM	2	ANDRADE, ABRAHAM				
	12/31/2006	3:18 PM	3:19 PM	1		4/22/2007	1:08 PM	1:23 PM	15
	2/3/2007	3:16 PM	3:42 PM	26		6/7/2007	3:59 PM	4:01 PM	2
				30		6/15/2007	3:05 PM	3:25 PM	20
ALONSO, ROSA LINDA									37
	3/24/2007	4:06 PM	4:34 PM	28	ANGELES, PABLO				
	4/1/2007	12:38 PM	1:04 PM	26		1/20/2007	1:22 PM	1:50 PM	28
	3/15/2007	1:14 PM	1:43 PM	29		1/27/2007	3:36 PM	4:04 PM	28
	2/20/2007	1:27 PM	1:56 PM	29		2/2/2007	3:41 PM	4:09 PM	28
	2/13/2007	1:05 PM	1:33 PM	28		2/15/2007	3:17 PM	3:46 PM	29
	2/7/2007	12:58 PM	1:26 PM	28		3/3/2007	4:36 PM	5:05 PM	29
	1/29/2007	4:48 PM	5:17 PM	29		4/7/2007	5:01 PM	5:03 PM	2
	6/6/2007	4:17 PM	4:45 PM	28		4/15/2007	2:36 PM	3:05 PM	29
				225		12/12/2006	12:32 PM	12:59 PM	27
ALVARADO, ARTURO						6/16/2007	2:09 PM	2:37 PM	28
	4/5/2007	6:05 PM	6:34 PM	29		8/23/2007	11:29 AM	11:58 AM	29
	10/10/2007	12:35 PM	1:00 PM	25		6/30/2007	4:05 PM	4:34 PM	29